85-584

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JACK GRANT, JR., EVELYN H. GRANT,
and all other persons similarly situated,
Petitioners,

VS.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas W. Tucker
Counsel of Record
Dye, Miller, Tucker & Everitt
Post Office Box 2426
Augusta, Georgia 30903
(404) 722-0771

John Bell Towill
David E. Hudson
Hull, Towill, Norman & Barrett
Post Office Box 1564 (13)
Augusta, Georgia 30913
(404) 722-4481

John B. Long
Nixon, Yow, Waller & Capers
1500 GA RR Bank Bldg.
Augusta, Georgia 30901
(404) 722-7541

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Does the *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit give a mobile home lender the right to claim federal preemption of an established state maximum rate of finance charge on the financing of a mobile home without providing in its contract with the borrower the concomitant consumer benefits mandated by Congress in the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 and the Regulations promulgated thereunder?

2. Does the same opinion give a mobile home lender the right to claim federal preemption where the contract is contrary to the consumer benefits mandated by the same statute and regulations?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OFFICIAL REPORTS OF OPINIONS BELOW	1
STATEMENT OF THE GROUNDS OF JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	5
INTRODUCTION	5
The United States Court of Appeals for the Eleventh Circuit in its opinion in *Grant v. General Electric Credit Corporation*, 764 F.2d 1404 (11th Cir. 1985) (en banc) has decided an important question of federal law which has not been, but should be decided by this Court	9
A. Comparison of the Georgia Motor Vehicle Sales Finance Act and the Preemption Act	12
B. The requirements of the Preemption Act were not met by respondent in its contract, and the Court of Appeals *en banc* was incorrect in holding otherwise	15
1. Failure to comply with the 30 day notice prior to acceleration	16
2. Right to Acceleration of the Entire Balance is Contrary to the Regulations	19
3. Inadequate and Misleading Information is given concerning the right to cure	21
4. The terms and conditions of the contract fail to disclose at all the right to notice prior to repossession or foreclosure	22
C. Sound Policy dictates strict compliance with the Preemption Act	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES Page

Borochoff Properties, Inc. v. Howard Lumber Co., 115 Ga. App. 691, 155 SE2d 651 (1967)00 17

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508. 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) 3

Ford Motor Credit Co. v. Hunt, 241 Ga. 342, 245 SE2d 295 (1978) 17, 23

Ford Motor Credit Co. v. Milline, 137 Ga. App. 585, 224 SE2d 437 (1976) 17

General Finance Corp. of Georgia v. Sprouse, 577 F.2d 989 (5th Cir. 1978) 9

Grant v. General Electric Credit Corporation, 764 F.2d 1404 (11th Cir. 1985) (en banc) ..... *passim*

Grant v. General Electric Credit Corporation, 727 F.2d 1073 (11th Cir. 1984) ..... *passim*

International Erectors, Inc. v. Wilhoit Steel Erectors & Rentals Service, 400 F.2d 465 (5th Cir. 1968) 18

Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985) 9

Pike v. Universal C.I.T. Credit Corp., 125 Ga. App. 83, 186 SE2d 482 (1971) 12

Quiller v. Barclays American/Credit, Inc., 764 F.2d 1400 (11th Cir. 1985) (en banc) ..... *passim*

Quiller v. Barclays American/Credit, Inc., 727 F.2d 1067 (11th Cir. 1984) ..... *passim*

Smith v. Society National Bank, 141 Ga. App. 19, 232 SE2d 367 (1977) 12

STATUTES

Depository Institution Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 ..... *passim*

12 U.S.C. § 86 13

12 U.S.C. § 1735(f)-7 14

28 U.S.C. § 1254(1) 2

Table of Authorities Continued

Page

28 U.S.C. § 2101(c) 2

Georgia Motor Vehicle Sales Finance Act, OCGA § 10-1-30, *et seq.* ..... *passim*

OCGA § 11-9-503 ..... 17, 23

OCGA § 24-6-1 23

OCGA § 44-14-230 23

OCGA § 44-14-232(b) 23

LEGISLATIVE HISTORY

H. Cong. Rep., No. 96-842, 96th Cong., 2d Sess. . 7, 11, 15

S. Rep., No. 96-368, 96th Cong. 2d Sess. 11

REGULATIONS

12 C.F.R. § 590.4 ..... *passim*

45 Fed. Reg. 31122 (May 12, 1980) 2, 12, 20, 23

45 Fed. Reg. 43681 (June 30, 1980) 2, 12, 20, 23

45 Fed. Reg. 43682 (June 30, 1980) 2

FTC, *Credit Practices Rule Statement of Basis and Purpose and Regulatory Analysis*, 49 Fed. Reg. 774 . 7

FTC, *Report of the Presiding Officer on Proposed Trade Regulation Rule: Mobile Home Sales and Service* (1979) 6, 7

FHLBB General Counsel Op. No. 1981-2, Fed. Banking L. Rep. (CCH) 83,002 (July 28, 1981) 6

OTHER REFERENCES

Burke, *Federal Preemption of State Usury Laws*, The Business Lawyer, Vol. 37, p. 747 (1981) ABA Annual Meeting Program) 13, 15

Rakoff, *Contracts of Adhesion*, 96 Harv. L.Rev. 1174 (1983) 19, 24

U. S. Dept. of Commerce, Bureau of the Census, *Annual Housing Survey*, Part A (1974) 6

U. S. Dept. of Commerce, Bureau of the Census, *U. S. Metropolitan Housing Characteristics*, Table A-8 (1983) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ____

JACK GRANT, JR., EVELYN H. GRANT,
and all other persons similarly situated,

Petitioners,

VS.

GENERAL ELECTRIC CREDIT CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

OFFICIAL REPORTS OF OPINIONS BELOW

The panel opinion of the Eleventh Circuit Court of Appeals in *Grant v. General Electric Credit Corp.* is reported at 727 F.2d 1073 (11th Cir. 1984), and the en banc opinion of the Eleventh Circuit in said case is reported at 764 F.2d 1404 (11th Cir. 1985) (en banc). The opinion of the United States District Court for the Southern District of Georgia dismissing petitioners' complaint for failure to state a claim is unreported.

The panel opinion of the Eleventh Circuit Court of Appeals in the similar action of *Quiller v. Barclays American/Credit, Inc.* is reported at 727 F.2d 1067 (11th Cir. 1984), and the *en banc* opinion of the Eleventh Circuit in said case is reported at 764 F.2d 1400 (11th Cir. 1985) (en banc).

Copies of all five of the aforesaid opinions are included in the Appendix of this Petition.

STATEMENT OF THE GROUNDS OF JURISDICTION

The judgment sought to be reviewed was entered on July 8, 1985 *en banc* by the United States Court of Appeals for the Eleventh Circuit.

The within Petition for Writ of Certiorari is presented within ninety days pursuant to 28 U.S.C. § 2101(c), and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Depository Institutions Deregulations and Monetary Control Act of 1980, 94 Stat. 161

OCGA § 10-1-33(a)

OCGA § 10-1-38(b)(c)

45 Fed. Reg. 31122 (May 12, 1980)

45 Fed. Reg. 43681, 43682 (June 30, 1980)

12 C.F.R. § 590.4

These statutes and regulations are set forth as Appendix F to this petition.

STATEMENT OF THE CASE

The within case commenced on March 25, 1983, in the United States District Court for the Southern District of Georgia with the filing of a class action complaint (R. 1) by Jack Grant, Jr. and Evelyn H. Grant (hereinafter petitioners) on behalf of themselves and all other persons similarly situated against General

Electric Credit Corporation (hereinafter respondent). The basis for federal jurisdiction in said Court was 28 U.S.C. § 1332 in that the petitioners and all other persons similarly situated and respondent were citizens of different states and the matter in controversy exceeded the sum of $10,000.00.

In response to said complaint, respondent filed a F.R.C.P. 12(b)(6) motion to dismiss for failure to state a claim in lieu of an answer (R. 26). Before any discovery at all had taken place, the District Court conducted a hearing on the motion to dismiss and granted same (R. 139). Therefore, the only facts before the District Court were the contentions of the petitioners in their complaint, which, at this juncture, must be taken at face value. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515-516, 30 L.Ed2d 642 (1972).

Accordingly, the following facts are taken from the complaint. On February 23, 1982, the petitioners purchased a new 1982 Redman, Eaton Park mobile home from Hutchinson Homes, Inc. (R. 4). The retail installment sales contract utilized to finance the purchase of said mobile home was a form prepared by respondent; it was anticipated that the said financing contract would be assigned from Hutchinson Homes, Inc. to respondent; and this assignment was in fact accomplished shortly after the contract was entered into by the petitioners and Hutchinson Homes, Inc. (R. 4).

At the time petitioners entered into the retail installment contract assigned to respondent, the maximum finance charge under Georgia law which respondent could exact from petitioners to finance their mobile home was a 10% add-on rate. O.C.G.A. § 10-1-33. However, the finance charge actually assessed by respondent exceeded an add-on rate of 13.6%, resulting in respondent's obtaining an additional $9,996.99 in finance charges to which it was not entitled under Georgia law. For this violation of Georgia law by respondent, petitioners sought a declaration that the respondent was barred from collecting any finance charge from petitioners and all other persons similarly situated. O.C.G.A. § 10-1-38(b). In the event that respondent's

violation was found by the Court to be willful, petitioners also prayed on behalf of themselves and all other persons similarly situated for recovery of double the time price differential (finance charge). O.C.G.A. § 10-1-38(c).

Anticipating that respondent would take the position that it was entitled to a higher rate of finance charge than that allowed by Georgia law by virtue of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (hereinafter Preemption Act) and Regulations (12 C.F.R. § 590.4) promulgated thereunder, petitioners set forth in their complaint that respondent had failed to provide in its contract with the petitioners and all those similarly situated the consumer benefits mandated by Congress in the Preemption Act and 12 C.F.R. § 590.4; and that, thus, the rate of finance charge was governed by Georgia law and had not been federally preempted. As such, respondent was not entitled to collect a higher rate of finance charge and by doing so, had violated Georgia law.

The particular portion of respondent's contract which petitioners contended contained provisions which were inconsistent with and contrary to the Preemption Act and 12 C.R.F. § 590.4 was as follows:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Differential calculated by the Pro-Rata Method provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

Petitioners alleged that the above-quoted portion of respondent's contract utterly failed to comply with the Preemption Act § 501(c)(2) and 12 C.F.R. § 590.4(h), thus denying respondent the privilege of federally preempting the Georgia maximum rate of finance charge, because:

1. Respondent's contract allowed respondent *immediately* to declare the entire contract amount due and payable upon petitioners' default by as little as one day in making payment when due.

2. Respondent's contract allowed respondent to accelerate and make immediately due and payable the entire principal balance of the contract less any unearned portion of the finance charge.

3. Respondent's contract gave unclear, indefinite and misleading information that the Petitioners and those similarly situated would be given an undefined notice of a right to cure prior to acceleration.

4. The "terms and conditions" of respondent's contract did not provide for a 30-day notice prior to repossession or foreclosure and were, in fact, contrary thereto.

As pointed out, the District Court ruled upon a F.R.C.P. 12(b)(6) motion that petitioners' class action complaint failed to state a claim as Georgia's maximum rate of finance charge had been federally preempted. The District Court's order was appealed by petitioners to the Eleventh Circuit Court of Appeals, a panel of which reversed the District Court, holding that Georgia state law had not been preempted due to respondent's contract being inconsistent with the Preemption Act and Regulations. *Grant v. General Electric Credit Corporation*, 727 F.2d 1073 (11th Cir. 1984).

On rehearing *en banc*, the panel opinion was reversed, and the District Court's order was affirmed. *Grant v. General Electric Credit Corporation*, 764 F.2d 1404 (11th Cir. 1985) (en banc). It is from this *en banc* opinion of the Eleventh Circuit that this Petition emanates.

ARGUMENT

Introduction

Before amplifying the reasons relied upon by petitioners for allowance of the writ of certiorari, petitioners would re-

spectfully submit that it is very important to recognize at the outset the

> history of abuse associated with mobile home lending. In large part, these abuses have resulted from the fact that mobile homes are usually financed under motor vehicle and retail installment sale laws, which allow lending practices that are not appropriate for loans as large as that required in a mobile home sale. As personalty, mobile homes have been also subject to summary repossessions in the event of default.

FHLBB General Counsel Op. No. 1981-2, Fed. Banking L.Rep. (CCH) 83,002 (July 28, 1981). Moreover, as a group, mobile home credit buyers are more vulnerable than the average homeowner because they are poorer and less well educated. U.S. Dept. of Commerce, Bureau of the Census, *Annual Housing Survey, Part A*, (1974).

Mobile home credit buying is dominated by poorer families. In 1980, 400,000 families were mobile homeowners with incomes below the poverty line. U.S. Dept. of Commerce, Bureau of the Census, *U.S. Metropolitan Housing Characteristics*, Table A-8 (1983). Fully 35% of mobile homeowners have incomes under $10,000.00. *Ibid.* About 25% of mobile homeowners are senior citizens, and young married couples comprise another 25%, FTC, *Staff Report on Mobile Home Sales & Service* at 37-39 (1979). More than for homeowners overall, 21% of mobile homeowners have less than a sixth grade education, and over half the mobile homes are located outside of metropolitan areas, *id.*, where there is frequently less access to consumer education and legal assistance.

When high finance charge rates are used to finance mobile home purchases (as when state limits are preempted) the debt is harder to manage and families are more likely to become overextended. The frequency of delinquency increases, and with it the occasion for collection abuses. When mobile homeowners are late in making a payment, it is often for reasons beyond their control. Like other consumer borrowers, lapses of

income from unemployment, uninsured or underinsured illness or injury, divorce, termination or reduction in pensions or other benefits, and unmanageable expenses like heating bills cannot be avoided, as the FTC found. FTC, *Credit Practices Rule Statement of Basis and Purpose and Regulatory Anaylsis*, 49 Fed. Reg. 7740, 7744, note 27 (1984).

Because of these disadvantages, mobile homeowners are disproportionately victims: they are easier to overawe, less able to understand or defend their rights and easier to intimidate. As the Presiding Officer in the FTC hearings on mobile homes summarized it:

> It is also clear that consumers purchasing mobile homes rely entirely on the expertise of both the dealer and the manufacturer to handle the sometimes complicated deals of the entire transaction.

FTC, *Report of the Presiding Officer on Proposed Trade Regulation Rule: Mobile Home Sales & Services*, at 31 (1979). They were also found to be less able to afford lawyers to discern their rights or to seek legal advice. *Id.* at 31, 38.

Congress undoubtedly had these factors in mind when it passed the Preemption Act and required certain consumer benefits to be in the contract in order to preclude overreaching by the creditor if higher rates were to be charged. H. Conf. Rep. No. 96-84 , 96th Cong., 2d Sess. 79, *reprinted in* 1980 U. S. Code Cong. & Ad. News 298, 309. These benefits are especially critical when a person's home is at risk.

Abusive bill collecting practices are much more likely to occur when they are not addressed in the written contract. For example, in the case of *Moyer, et al v. Citicorp Homeowners, Inc. and Citicorp Acceptance Co., Inc.*, District Court No. CV183-93, wherein discovery was allowed, the District Court, after an evidentiary hearing, held that:

> Here we have a situation where the lender [Citicorp] has gone somewhat further than a situation where it has merely attempted to utilize contractual provisions which

are contrary to the statute and regulations. We have a situation where the lender through its agents and operatives have gone even beyond the contract and demanded immediate possession and taken action by telephone to repossess and to foreclose.

Now it could be said that these are merely threats, promises, or statements which are hollow because they are contrary to the statute, and once a debtor gets to his lawyer, his lawyer will obviously advise the creditor that they simply can't do that.

However, . . . not every contract gets to litigation. It is inappropriate to assume that, and that I believe is exactly what the Quiller majority observed in the panel opinion.

I observed, as I recall that in the hinterland of Georgia or South Carolina there may be a State Court Judge or a lawyer steeped in local or state practice who is not familiar with the Code of Federal Regulations or 12 United States Code Section 1735(f)-7, and those persons reading the simple terms of a contract might be misled, not just the debtor but the lawyer and Judge could even be misled by the terms of the contract. Then, going back again to the other observation, it's not a fact that every one of these situations will end up in foreclosure.

The Kerleys and McAffees are two object lessons in that regard. It appears quite clear from the evidence available that they left on the strength of the threats. They wanted to get their household belongings. There were threats that were made that not only would the trailer be seized, but household possessions would be seized, "the axles and trucks were on the way for that purpose." So here we have not only threats, but we can only consider a telephone call by a person who is employed, armed and engined for purpose of making telephone calls, the act of an agent authorized and taken at the instance of and for the purpose of, for the use and benefit and on behalf of the lender.

Transcript of hearing before the United States District Court for the Southern District of Georgia on July 9, 1984 in *Moyer, et al. v. Citicorp, et al.*, File No. CV183-93 at pages 17-20 [attached as an addendum to petitioners' reply brief en banc in the Eleventh Circuit in the case at bar].

The Fifth Circuit recognized this same problem in *General Finance Corp. of Georgia v. Sprouse*, 577 F.2d 989 (5th Cir. 1978) and said the relevant question was not how a court would interpret a contract without necessary consumer safeguards but how the borrower behaves in the actual world of commerce:

> We must also ask whether the lender might be able to employ certain provisions of the contract to exact illegal charges from unsuspecting debtors. It is naive to assume that every controversy culminates in litigation. The [statutory] policies require us to consider the actual operation of the contract in the commercial world.

Id. at 993. *Accord, Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984) *aff'd on rehearing* 764 F.2d 1400 (11th Cir. 1985) (en banc). *Jeter v. Credit Bureau*, 760 F.2d 1168 (11th Cir. 1985) (to determine whether the Fair Debt Collection Practices Act has been violated, the court is obligated to decide whether least sophisticated consumer would be deceived, mislead, or harassed by creditor's actions).

Against this backdrop, the reasons for granting of a writ of certiorari will now be examined.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN ITS OPINION IN *GRANT V. GENERAL ELECTRIC CREDIT CORPORATION*, 764 F.2d 1404 (11th Cir. 1985) (en banc) HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The instant action is only one of five class action cases which were filed in the United States District Court for the Southern

District of Georgia. The District Court dismissed the petitioners' complaint in the case at bar for failure to state a claim, holding that the Georgia maximum finance charge had been preempted. A panel of the Eleventh Circuit reversed, 727 F.2d 1073, but the Court of Appeals *en banc* affirmed, 764 F.2d 1404. In *Quiller v. Barclays American/Credit, Inc.*, the District Court dismissed the class action complaint on the same basis, and this holding was reversed by the Eleventh Circuit Court of Appeals *en banc*, finding that the Georgia maximum finance rate had not been preempted by Barclays form contract. 764 F.2d 1400. The same District Court in the class action cases of *Moyer, et al. v. Citicorp Homeowners, Inc. and Citicorp Acceptance Co., Inc.*, District Court No. CV183-93; *Doyle v. Southern Guaranty Corporation*, District Court No. CV184-180; and *Wood v. Fort Wayne Mortgage Company*, District Court No. CV 184-204 has granted summary judgments to the plaintiffs or denied defense motions to dismiss, holding that the Georgia maximum finance charge had not been preempted by the respective lenders because their contracts contained provisions inconsistent with and contrary to congressionally mandated consumer benefits. These latter three cases are now all pending in the United States Court of Appeals for the Eleventh Circuit. The total number of families involved in these five cases is approximately 7,500. (Total finance charges in Georgia alone are approximately one quarter of a billion dollars, and the finance charges in excess of that allowed by Georgia law which these families are paying are approximately $100,000,000.00).

Petitioners respectfully submit that there is a conflict in the *en banc* opinions rendered by the United States Court of Appeals in *Grant* and *Quiller* and that this novel and important question of federal law pertaining to the effect and construction of the Preemption Act and 12 CFR § 590.4 should be finally settled by this Court so that the respective rights and responsibilities of mobile home borrowers and lenders in all the States can be clarified and finally resolved.

It is the position of petitioners that the Court of Appeals, in a totally result-oriented opinion, has completely ignored the in-

tent and purpose of Congress in the passage of the Preemption Act. Congress did not take the unprecedented step of preempting two centuries of states' control over their own interest and finance charge rate structures without intending to assure that the citizens of the respective states would receive certain consumer benefits in the "terms and conditions" of the financing contracts. Senator Morgan stated, in opposition to the preemption provisions:

> [T]his bill would seek to preempt the long-standing authority of States which are in a superior position to deal with situations unique to their respective regions, and would impose national usury norms which would, in the long run, be less responsive and less appropriate for States than would measures designed by their respective legislatures.

S.Rep, No. 96-368, Oct. 15, 1979, at 41, *reprinted in* 1980 U. S. Code Cong. & Admin. News 236, 277.

Such federal interference with the public welfare authority of the states was an extraordinary step, perhaps justified by the situation. So the extraordinary lender benefit of unfettered interest and finance charge rate selection was balanced by preconditions. Effort was made to avoid sacrificing important state law protections and the unreasonable loss of vulnerable consumers' homes. In order to give protection to borrowers against the predictable abuses of unlimited rate lending, interest rate preemption was conditioned on a series of minimum consumer protections plus deference to more protective state laws generally. H. Cong. Rep. No. 96-842, 96th Cong., 2nd Sess. 79, *reprinted in* 1980 U. S. Code. Cong. & Admin. News 298, 308.

In the congressional plan, mobile home lenders were given a choice—they could provide the mandated consumer benefits and preempt State established rates or they could forego providing the benefits and charge the rate set by the respective states. As is all too typical in contracts of adhesion, the respondent herein drafted its contract, charged the higher rate,

and did not include therein the notice to the debtor that he had a right to a 30-day notice prior to the lender's instituting any action leading to repossession or foreclosure. The contract even allowed lender conduct expressly prohibited by the FHLBB regulations in a preemption contract.

The *en banc* opinion of the United States Court of Appeals improperly allows a lender to draft its financing contract in such a way that the debtor will have absolutely no idea of his right to such a notice and leaves the debtor to the caprices of the lender, and this was not the intent of Congress. 45 Fed. Reg. 31122 (May 12, 1980) stated that "state usury ceilings may be exceeded by a lender covered by the Act *only if the loan complies with such regulations.*" (Emphasis added). Additionally, 45 Fed. Reg. 43681 (June 30, 1980) provided that "[t]he rules prescribe *consumer protections which must be included in loans* secured by first liens on mobile homes before such loans are eligible for the state usury law exemption . . ." (Emphasis supplied). It could not be any clearer that the benefits, including the right to the 30 day notice, were to be included in the loan documents themselves.

It is this particular benefit of 30 day notice before acceleration, repossession or foreclosure to which this petition is addressed.

A. Comparison of the Georgia Motor Vehicle Sales Finance Act and the Preemption Act.

Mobile home sales in Georgia are governed by the Georgia Motor Vehicle Sales Finance Act (Georgia Act). *Smith v. Society National Bank*, 141 Ga. App. 19, 20, 232 SE2d 367 (1977); *Pike v. Universal CIT Credit Corporation*, 125 Ga. App. 83, 84, 186 SE2d 482 (1971).

The Georgia Act provides a permissible finance charge on a new mobile home of $10.00 per $100.00 per year. OCGA § 10-1-33(a). This is known as "add-on rate."

For a violation of the Georgia Act, the minimum relief to which a plaintiff would be entitled is to preclude the lender from collecting any finance charges in the transaction.

> A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

OCGA § 10-1-38(b). *If* it should be found that a violation was willful, then the borrower is entitled to recover double the time price differential charged in the transaction. OCGA § 10-1-38(c).

Such statutory rights are not uncommon for violations of finance charge or interest limits. For example, the National Bank Act, 12 U.S.C. § 86, imposes a loss of all unpaid interest where the contracted interest exceeds permissible limits, and twice the amount of any interest actually paid under an usurious loan.

It is next necessary to review the provisions of the Preemption Act. The respondent stressed below that the Preemption Act was passed to ease a credit crunch during the time of unusually high interest rates. However, it was clear from the very beginning that the removal of interest and finance charge ceilings was not the only consideration where the financing of mobile homes was concerned.

> A second qualification is that, in order for the preemption to extend to the rates for mobile home loans, the statute and regulations require creditors to honor certain consumer protections for the customers in those transactions. There is a trade-off of rate relief for consumer protections in those mobile homes transactions.

Burke, *Federal Preemption of State Usury Laws*, The Business Lawyer, Vol. 37, p. 747, 749 (1981 ABA Annual Meeting Program). Thus, in connection with the financing of mobile homes, Congress specifically provided that state law would not be preempted *unless* the "*terms and conditions*" relating to such "credit sale" specifically gave the borrower certain benefits that would not be available under state law. Preemption Act § 501 (c).

Accordingly, for a mobile home installment sale made in the state of Georgia, a lender, if it wished to be relieved of the

restrictions on finance charges imposed by Georgia law, would have to give a retail buyer or borrower the following additional benefits:

1. Restrictions on acceleration, repossession and foreclosure. Under the federal scheme, the lender has no right to act to repossess or to foreclose, or to accelerate payments of the entire outstanding balance of an obligation against a debtor until 30 days after the creditor sends the debtor a specified notice of default and the right to cure default. 12 C.F.R. § 590.4(h). This right to a 30-day notice or 30-day grace period also has to be a *term and condition* of the contract. Preemption Act, Title V, § 501(c)(2). (*The respondent did not provide this benefit in its contract; and, in fact, its contract is inconsistent with and contrary to this benefit*). There is no similar provision in Georgia law.

2. Restrictions on prepayment penalties. (The respondent provided this benefit in its contract even though petitioners alleged below that it was not in the proper type size). Preemption Act, Title V, § 501(c)(1), 12 C.F.R. § 590.4(d). The right to prepay is also given under the Georgia Act, however, there is a $25.00 acquisition charge which could be considered as a prepayment penalty. OCGA §§ 10-1-33(b), 10-1-34.

Also, the Preemption Act and Regulations restricted the method of calculating refunds of finance charges, granted a 15 day grace period before the lender could impose late charges, restricted balloon payments and deferral fees, all more favorable to the borrower than under Georgia law. *Compare with* OCGA §§ 10-1-32 (g) and 10-1-34.

Congress had great concern about preempting state law relating to finance charges that could be assessed on the purchase of mobile homes or manufactured homes. One year before the Preemption Act was passed, Congress relieved lenders of all restrictions on interest rates and finance charges in connection with the financing of conventional home mortgages. 12 U.S.C. § 1735f-7. Mobile home financing was treated differently in that Congress placed added restrictions upon len-

ders and credit sellers not required for conventional residential financing, obviously for the reasons set forth in the Introduction of this Petition. Preemption of interest rates for mobile homes was conditioned upon specific consumer protection benefits. *See*, H. Conf. Rep. No. 96-842; Burke, *Federal Preemption of State Usury Laws*, *supra*.

Those benefits are either set forth in the statute itself or in the regulations promulgated by the Federal Home Loan Bank Board under authority given in the Preemption Act. The retail seller or ultimate lender cannot choose to accept the advantage of an unlimited finance charge and not give the borrower or debtor those consumer benefits required by the Preemption Act and 12 C.F.R. § 590.4. In the case at hand, the lender had to comply fully with either the Preemption Act or with state law; the choice was that of the lender. Preemption Act § 501(c).

B. The Requirements of the Preemption Act Were Not Met by Respondent in its Contract and the Court of Appeals was incorrect in holding otherwise.

The critical language from § 501(c) of the Preemption Act is as follows:

> The provisions of sub-section (a)(1) [preemption of state limits on interest and finance charges] *shall not apply* to a loan [or] credit sale . . . *unless the terms and conditions* relating to such loan [or] credit sale . . . *comply with the consumer protection provisions specified in regulations* prescribed by the Federal Home Loan Bank Board. *Such regulations shall—*
>
> > (2) *require a 30-day notice prior to instituting any action* leading to *repossession or foreclosure* . . .
> >
> > . . (4) *include such other provisions as the FHLBB may prescribe* . . . .

(Emphasis supplied).

Respondent's contract violates the Preemption Act and 12 C.F.R. § 590.4 in at least four respects pertinent to this Petition, all of which deficiencies were improperly given judicial

sanction by the Court of Appeals in its *en banc* opinion. This directly contravened the intent and purpose of Congress to the benefit of mobile home lenders and to the detriment of the mobile home buying public and the respective states' rights to protect their citizens from unlawfully high finance charges. Each of these deficiencies is now examined in greater detail.

1. *Failure to Comply with the 30 Day Notice Prior to Acceleration.* There can be no dispute but that the Preemption Act requires the "terms and conditions" of the credit sale to comply with 12 C.F.R. § 590.4. Failure to do so deprives the lender of federal preemption of state limits on interest and finance charges. Preemption Act § 501(c).

The next step is simply to compare the contract with the regulations. 12 C.F.R. § 590.4(h) very clearly states "that no action . . . to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default. . ."

When respondent's contract is examined in light of these requirements, is is plainly invalid. Under the heading "Late Payment, Default and Default Charges," the contract states as follows:

> In the event of Buyer's *default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder*, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Differential calculated by the Pro-Rata Method provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

(Emphasis added). Respondent very simply reserved for itself the right to declare the contract immediately due. The regulations state that 30-days' notice must be given before a lender or seller may take such action. The only exceptions would be "extreme circumstances" such as abandonment of a home, or a

debtor in default for the third time in one year. 12 CFR § 590.4(h). These are not mentioned in the form contract which plainly triggers default by mere late payment. Thus, respondent has used a contract with "terms and conditions" that do not comply with the FHLBB regulations.

Respondent defended its contract in the lower courts by reference to the language that appears later and states: "provided that Buyer shall be given notice of right to cure default." But does this language correct the deficiency? The answer is no.

What is contained in the respondent's contract is an absolute contradiction. The contract states that payment shall be due on the eighth day of each month. If the buyer misses that payment "when due," the contract says that the entire balance then becomes immediately due and payable at the option of the Seller. On the other hand, respondent has plugged in a vague and unspecified reference two lines later to a "notice of right to cure." If there is such a right to prior notice, then is it in fact possible for the lender to make the entire balance "immediately due" if the purchaser fails to make a payment "when due?"

When the purchaser searches his contract to see what this "notice of right to cure" is, he will find nothing. There is no mention of or reference to the Preemption Act. Under Georgia law, unless the contract spells out such a right on the part of the purchaser, there is no entitlement to any such notice. *See*, O.C.G.A. § 11-9-503; *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 SE2d 295 (1978); *Ford Motor Credit Co. v. Milline*, 137 Ga. App. 585, 588, 591, 224 SE2d 437 (1976); *Borochoff Properties, Inc. v. Howard Lumber Company*, 115 Ga. App. 691, 696, 155 SE2d 651 (1967).

The Court of Appeals completely ignored how the contract would operate under controlling Georgia authority by stating that the issue was not "what Georgia requires, but what the federal preemption scheme requires." 764 F.2d at 1408. The fallacy of this conclusion is readily apparent when it is considered that a creditor seeking to repossess must resort to

Georgia courts or to diversity jurisdiction of Federal courts which will be governed by Georgia law. Courts might or might not be familiar with the "federal preemption scheme," and even when they are, there is nothing in the contract to invoke a 30 day grace period for the debtor. The result is that peoples' homes could be lost. The panel opinion in *Quiller*, 727 F.2d 1067, 1071, *aff'd en banc* 764 F.2d 1400 specifically recognizes this problem, but the Grant *en banc* opinion described the contract reference to notice as "unambiguous" and cavalierly assumes that a creditor will do the right thing. That is not the reality of the marketplace. *See* excerpt from the United States District Court for the Southern District of Georgia in *Moyer*, *supra*, at 7-9.

To the average reader, the proviso relied upon by the respondent would most likely refer to the calculation of the refund of the unearned portion of the finance charge. The clause concerning refund of the finance charge is separated from the remainder of the sentence by a comma and the language concerning right to cure default is likewise included in that separated portion. At page 7 of its petition for rehearing before the Court of Appeals, respondent cited *International Erectors, Inc. v. Wilhoit Steel Erectors and Rental Service*, 400 F.2d 465 (5th Cir. 1968), for the proposition that a proviso "must be construed as a limitation on the language preceding it." That is just the problem here. The preceding language has to do with refund of the finance charge, and no reasonable construction of the sentence would tie the right to notice (whatever it is) to the lender's right to *immediately* declare the debt due.

The panel opinion correctly acknowledged that the right of immediate acceleration is "directly contrary to the statute and . . . the regulations . . ." 727 F.2d at 1075. The panel characterized the qualifying clause relied on by GECC as transmitting a conflicting message to that previously given concerning immediate acceleration. *Id.* The *en banc* court declined to follow this reasoning. 764 F.2d 1404 at 1406-1407. Nevertheless, the defect is actually worse than stated by the panel. The panel surmised that a borrower might be aware of the

Preemption Act and have some knowledge of the contradiction between what is required by the statute and regulations and what is expressed in the contract. However, as previously noted, the law in Georgia gives no implied right to notice of cure and none is stated elsewhere in the contract. Moreover, the contract does not state or indicate in any fashion that it is subject to or incorporates the Preemption Act or the regulations. Thus the words "notice of right to cure" sit there with no definition, with no reference to any body of law, and in contradiction to the express language that the lender has the right of immediate acceleration.

This defect in the respondent's contract is not a mere technicality or a matter of idle academic interest. It is the type of overreaching which greatly affects the financial welfare of consumers. Faced with the prospect of having the contract immediately accelerated, the purchaser may opt for bankruptcy relief, may have to sell other property at distress prices in order to try and protect his home, may surrender the home, or may be forced by agents of lenders into making payments sooner or in greater amounts than those required by the Preemption Act or Georgia law. The *en banc* opinion, if allowed to stand, will authorize unscrupulous lenders to create just such situations, which was exactly what Congress was attempting to prohibit.

If the lender is left with the option to enforce unlawful terms, "[the consumer's] recourse is now based solely on the willingness of the drafting party . . . The discretion of the organization has taken the place of rights enforceable by law." Rakoff, *Contracts of Adhesion*, 96 Harv. L. Rev. 1193, 1228 (1983). (The dissent in *Grant en banc* aptly points out the realities of what can occur with provisions such as those contained in the petitioners' contract, 764 F.2d at 1409-1411, as does the District Court's opinion in *Moyer, supra*).

2. *Right to Acceleration of the Entire Balance is Contrary to the Regulations.* In its contract, respondent retains for itself the right to declare due and payable "all installments due or to

become due hereunder, less the unearned portion of the finance charge." This is contrary to the following portion of the regulations:

> In the case of default on payments, the sum stated in the notice may *only include payments in default and applicable late or deferral charges.* If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

(Emphasis added). 12 C.F.R. § 590.4(h).

Thus, the contract provision allowing respondent to accelerate the entire balance is as contrary to the purchaser's protection in the regulations as any wording could be. If the lender wants to receive the benefit of unlimited interest rates or finance charges under the federal act, it *must* use a contract that conforms to the consumer protection benefits in the regulations. Preemption Act § 501(c); 45 Fed. Reg. 31122 (May 12, 1980); 45 Fed. Reg. 43681 (June 30, 1980). In the respondent's contract, the debtor is subject to having the entire balance become due when he misses a payment by as little as one day, but the regulations give a lender only the right to require that the past due installments and late charges have to be paid.

The *Grant en banc* court attempts to get around this deficiency by stating "[t]here is no allegation that [respondent] sent a notice of default contrary to that of 12 C.F.R. § 590.4." 764 F.2d at 1407. This conclusion is wrong in at least two important respects. One, Congress did not intend for preemption to be governed by subsequent *conduct* of the lender but by the "terms and conditions" of the loan at the time of contracting; and, two, the complaint was dismissed on a FRCP 12(b)(6) motion before any discovery was allowed. If what the Eleventh Circuit *en banc* court says is correct, a lender can improperly threaten a consumer with having to pay the *entire debt* because that is what the contract provides and the con-

sumer has no right to relief. *That is absolutely not what Congress intended.*

3. *Inadequate and Misleading Information is Given Concerning the Right to Cure.* As argued *supra*, the language concerning "notice of right to cure default" will not remedy the flaws that respondent has built into its form contract, i.e., immediate acceleration, and acceleration of the entire balance. Even if one does make that argument, as respondent has attempted to do, it would only show another instance in which the contract provisions do not comply with the regulations.

12 C.F.R. § 590.4(h) not only requires that a debtor be given 30 days notice before the lender accelerates the entire balance, but the debtor is also given the right to cure any default for 30 days. Notice of this right must be given to the debtor. Measured by these requirements, the respondent's form contract does not comply.

The contract form makes only a reference to an undefined "notice of right to cure." As pointed out above, unless the federal regulations are incorporated by reference, or unless the right to cure is given some definition in the contract, under controlling Georgia law, the debtor has no such right.

Moreover, after reading respondent's contract, how will the buyer know whether the notice will come 30 days in advance of the seller's action against him, one week in advance, or fifteen days? Other pertinent dates in the contract are specifically set forth. Under the heading "Property Insurance," there is a 10 day notice of cancellation provisions. Under the "Late Payment" provision, there is a 15 day limit before delinquency charges are imposed. Under the "Additional Terms and Conditions" on the back of the document, there is a 10 day period within which the buyer must make demand for the return of items on which the seller does not have a security interest. However, on this crucial matter of notice which respondent argues is given by its form contract in terms sufficient to earn preemption the buyer is left, at best, to guess as to what notice he will receive.

The most likely reading by a consumer debtor would lead to the understanding that there is nothing that he can do to prevent acceleration and other creditor remedies upon default. Once the debtor reads about default in payment "*when due*" and the seller's right to "*immediately*" act against him, it is likely that the subsequent language about "notice of right to cure" would be meaningless. If it has any meaning to the debtor, he will most likely consider it to refer to the calculation of the unearned portion of the finance charge, which is the clause, separated by a comma from the first part of the sentence, that the "notice of right to cure" appears to modify.

In sum, petitioners submit that there is no reasonable construction of this contract that can conform these onerous provisions to the consumer protection benefits in the regulations. That being the case, the terms and conditions of the contract are contrary to the regulations, and the creditor was not entitled to charge finance charges in excess of Georgia law.

4. *The Terms and Conditions of the Contract Fail to Disclose at All the Right to Notice Prior to Repossession or Foreclosure.*

It must be remembered that the 30 days' notice referred to at this point is grounded in the statute and not in the regulations. Previously in this Petition, the regulatory requirement found at 12 C.F.R. § 590.4(h) for notice prior to *acceleration* has been discussed. The question now is whether the statute imposes an independent requirement that notice prior to *foreclosure or repossession* be contained in the terms and conditions of the contract itself.

The Preemption Act requires the "terms and conditions" of the contract to be in compliance with the regulations. The Act then goes on to specify that the Board "regulations shall . . . (2) require a 30 day notice prior to instituting any action leading to *repossession or foreclosure* . . ." (Emphasis added). The question becomes: how can the terms and conditions comply with this requirement without incorporating the 30 days notice language into the contract between the parties? It cannot be done, and this fact is clearly pointed out in the comments of the Board

prior to the final promulgation of 12 C.F.R. § 590.4. 45 Fed. Reg. 31122 (May 12, 1980) ("state usury ceilings may be exceeded by a lender covered by the Act only if the loan complies with such regulations"); 45 Fed. Reg. 43681 (June 30, 1980) ("the rules prescribe consumer protections which must be included in loans").

By requiring that the terms and conditions of a preempted contract shall comply with the regulations which must include a 30 day notice provision, Congress has obviously signalled its intent that borrowers receive 30 days' notice before the collateral can be repossessed or foreclosed; and in the state of Georgia, unless such a right is expressly included in the contract, the right does not exist.

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

OCGA § 11-9-503. *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 SE2d 295 (1978) confirms that the contract must contain a specific provision to the contrary, or else the creditor can repossess without notice. If the creditor wishes to use judicial process, it may still repossess on 7 days' notice. OCGA § 44-14-230, 232 (b).

If respondent were to file suit in a Georgia court to enforce its contract right of repossession, and the sole defense of the borrower is that it was not given a 30 day notice to cure default, what would be the outcome? Georgia courts would apply the parole evidence rule, OCGA § 24-6-1, as well as the above cases holding that there is no implied right of notice prior to foreclosure or repossession, and enter judgment in favor of the lender. The consumer protection benefit which Congress obviously required as a condition of preemption would be illusory. The *en banc* opinion in *Grant* has just this effect.

The *en banc* court recognized that the GECC contract is silent concerning notice prior to foreclosure or repossession.

764 F.2d at 1407. It adopted the panel opinion in *Quiller* as authority that a contrct may be silent in regard to this consumer benefit and still be entitled to preemption. The *Quiller* opinion discusses this point at 727 F.2d at 1070-71.

The *Quiller* opinion ignored the fact that a contract "silent" in regard to notice prior to repossession or foreclosure is a contract in Georgia which allows immediate self-help repossession or judicial foreclosure upon seven days' notice. The *Grant en banc* opinion recognizes the problem, but blithely opined that "there is no allegation that GECC *conducted* its business in such a manner." (Emphasis added). The fallacy here is the Court's failure to follow the requirement of Congress in § 501(c) that the "terms and conditions" of a contract be in compliance with the law. *See, also*, 45 Fed.Reg. 31122 (May 12, 1980), and 45 Fed.Reg. 43681 (June 30, 1980) where the FHLBB acknowledged that the contract document itself must be in compliance with the law.

Respondent had a choice. It could have contracted for a finance charge in compliance with Georgia law—approximately 14½% simple interest on a fifteen year contract (10% add-on). To go above that rate, its form contract had to "comply with terms and conditions" of federal law. Many mobile home lenders drafted their contracts with straightforward language consistent with the Act and FHLBB regulations. Why GECC did not cannot be determined on the present record. Unless the statute passed by Congress is to be ignored, the GECC form document is not sufficient to preempt state law in Georgia.

C. Sound Policy Dictates Strict Compliance With the Preemption Act.

The respondent's form is a prototype contract of adhesion. It has all of the characteristics and was generally entered into under all of the circumstances that typically characterize these one-sided legal instruments. Rakoff, *Contracts of Adhesion*, 96 Harv. L. Rev. 1174, 1177 (1983). Such instruments are intended by the draftsmen to be exactly that way.

> We have seen that the dynamics of the use of the standard form contracts tend to encourage draftsmen to write terms that are more favorable to the business firm than is its own practice. Unconstrained by the considerations of customer goodwill and satisfaction that help to police business practice but not invisible terms, the draftsman tries to insulate business practice from legal oversight.

Id. at 1275.

The drafting and use of such forms is undertaken against a backdrop of consumer ignorance.

> [T]he adhering party is in practice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them. Virtually every scholar who has written about contracts of adhesion has accepted the truth of this assertion . . .

Id. at 1179.

Turning to the case at hand, it is readily apparent that the issue is not de minimus. Under the Georgia Act, the maximum lawful finance charge would have been $47,579.04. Instead, respondent has imposed a finance charge of $57,546.00. This exceeds by almost $10,000.00 the amount which was lawful under Georgia law. Thus, it easily can be seen that mobile home lenders are collecting millions of dollars in finance charges beyond what state law would permit. For this not insignificant benefit, Congress clearly intended to protect the borrowers. The opinion of the Eleventh Circuit *en banc* in *Grant*, if not reviewed and corrected, will allow lenders to be unjustly enriched at the expense of mobile home borrowers who have not and will not receive the consumer benefits required by Congress.

CONCLUSION

Congress was specific in its instructions to lenders who desired to collect interest or finance charges greater than allowed by state law. In the Preemption Act, Congress was unmistakable in its warning that preemption would not apply "unless the terms and conditions relating to such loan . . . comply with consumer protection provisions specified in regulations prescribed" by the FHLBB. Preemption Act § 501(c). There are at least four instances in the respondent's contract where it conflicts with or does not comply with the statute or with the regulations. Any one of these is sufficient to deprive respondent of the conditional preemption.

The existence of these terms and conditions places the retail sales contracts between respondent and the petitioners and those similarly situated back under the Georgia Act. There, it is plain that an excessive finance charge has been imposed. Thus, the cause of action is properly stated, and it was error for the District Court to dismiss the complaint and for the Eleventh Circuit Court of Appeals *en banc* to affirm.

For the reasons set forth in the within Petition, writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

THOMAS W. TUCKER

Counsel of Record
DYE, MILLER, TUCKER & EVERITT
Post Office Box 2426
Augusta, Georgia 30903
(404) 722-0771

JOHN BELL TOWILL
DAVID E. HUDSON
HULL, TOWILL, NORMAN & BARRETT
P.O. Box 1564 (13)
Augusta, Georgia 30913
(404) 722-4481

JOHN B. LONG
NIXON, YOW, WALLER & CAPERS
1500 Georgia Railroad Bank Building
Augusta, Georgia 30901
(404) 722-7541

APPENDICES

APPENDIX

TABLE OF CONTENTS

APPENDIX A—*En banc* opinion of the United States Court of Appeals for the Eleventh Circuit in *Grant v. General Electric Credit Corporation*, reported at 764 F.2d 1404. ..... 1a

APPENDIX B—Panel opinion of the United States Court of Appeals for the Eleventh Circuit in *Grant v. General Electric Credit Corporation*, reported at 727 F.2d 1073. ..... 13a

APPENDIX C—*En banc* opinion of the United States Court of Appeals for the Eleventh Circuit in *Quiller v. Barclays American/Credit, Inc.*, reported at 764 F.2d 1400. ..... 18a

APPENDIX D—Panel opinion of the United States Court of Appeals for the Eleventh Circuit in *Quiller v. Barclays American/Credit, Inc.*, reported at 727 F.2d 1067. ..... 27a

APPENDIX E—Order of the United States District Court, Southern District of Georgia, Augusta Division, granting General Electric Credit Corporation's FRCP 12(b)(6) motion to dismiss in *Grant v. General Electric Credit Corporation*, unreported. 37a

APPENDIX F—Statutes and Regulations 38a

APPENDIX A

JACK GRANT, JR., EVELYN H. GRANT, and
all other persons similarly situated,
Plaintiffs-Appellants,

v.

GENERAL ELECTRIC CREDIT CORPORATION,
Defendant-Appellee

No. 83-8456.

United States Court of Appeals,
Eleventh Circuit.

July 8, 1985.

[Reported at 764 F.2d at 1404 (1985)]

Appeal from the United States District
Court for the Southern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK*, Circuit Judges.

PER CURIAM:

This is the second of two cases taken *en banc* to determine whether the mobile home financing contracts involved satisfy certain conditions imposed by federal law that would entitle the contracts to be exempt from state law interest ceilings. By meeting the requirements of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (1980) (codified at 12 U.S.C.A. § 1735f-7 note) (the "Act") and the regulations promulgated thereunder by the Federal Home Loan Bank Board (FHLBB), *see* 12 C.F.R. § 590.4, certain financing agreements

---

*Circuit Judge Thomas A. Clark, recused himself and did not participate in this decision.

preempt state law interest ceilings, thereby enabling creditors to charge a rate of interest in excess of state law limits.

In the other case, a panel of this Court had held that, although a contract need not contain express terms tracking the provisions of the statute or regulations to qualify for preemption, "a creditor cannot obtain the benefits of preemption if the financing agreement contains express provisions authorizing conduct *contrary* to the statute or regulations." *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984). That panel opinion has now been reinstated by the *en banc* court. *Quiller v. Barclays American/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985) (en banc). In this case the Court now decides that the different contract provisions before us are not clearly contrary to the requirements of the statute and regulations, so the creditors are entitled to the benefits of federal preemption. The district court's dismissal of this action is affirmed.

The Grants' Claim

In February 1982, plaintiffs Jack and Evelyn Grant purchased a mobile home from Hutchinson Homes, Inc. The parties entered into a retail sales installment agreement on a form contract prepared by defendant General Electric Credit Corporation (GECC), to which Hutchinson Homes assigned the contract shortly after the Grants took possession of the mobile home. The interest rate on the contract exceeded an add-on rate of 13.6%, 3.6% higher than the 10% maximum finance charge then allowed under the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 to -38 (Michie 1982).

In March 1983, the Grants instituted a class action against GECC in federal district court alleging a violation of Georgia Usury law and seeking damages and injunctive relief. Anticipating that GECC would raise the defense that the interest rate was valid under section 501 of the federal Act, the Grants alleged that the GECC contract lacked the consumer protections required by the Act as a condition to exempting the

finance charge from the state usury law interest ceilings. The district court dismissed the action as preempted by federal law.

The Grants contend the GECC contract failed to comply with the FHLBB regulations in five particulars. Four of these instances involve the following language contained in one sentence of the GECC contract:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Differential calculated by the Pro-Rata Method provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

Following the holding in *Quiller*, we examine separately, in the order in which they were presented, arguments that the GECC contract is directly contrary to the federal statute and regulations.

Right to Notice Prior to Acceleration

The Grants contend that the phrase "Seller may declare immediately due and payable any and all installments due or to become due hereunder . . ." is a "term or condition" of the contract that fails to comply with 12 C.F.R. § 590.4(h), which states that "no action . . . to accelerate payment of the entire outstanding balance of the obligation . . . may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default." The contract language, the Grants argue, reserves for GECC the right to declare the entire contract "immediately due and payable," contrary to the 30-day notice required by the regulations. The GECC contract contains, however, the qualifying clause "provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right."

As held in *Quiller*, the federal preemption statute does not require a disclosure in the contract of the notice rights given by

the Act and regulations, nor does it eliminate the creditor's right to accelerate upon default. A creditor is required to send the debtor a notice of default providing a 30-day grace period during which the debtor may correct the default and continue with the contract as though the default had not occurred. 12 C.F.R. § 590.4(h). The GECC contract's qualifying clause, which is cast in mandatory terms, unambiguously informs the debtor that he or she "shall be given notice of right to cure default" before "seller is permitted" to exercise its right to accelerate. Although the contract does not reveal that the debtor has 30 days in which to cure the default, there is no contention that notices sent to the Grants failed to notify them of the 30-day grace period. That grace period is prominently revealed in the sample notice of default and right to cure contained in the regulations. *See* 12 C.F.R. § 590.4(h)(2).

This "term or condition" of the contract is not contrary to the statute and regulations governing federal preemption.

Acceleration of the Entire Balance

The Grants also contend that the acceleration provision of the contract is contrary to the following portion of the FHLBB regulations:

> In the case of default in payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

12 C.F.R. § 590.4(h). The Grants argue that the contract provision allowing GECC to accelerate "all installments due or to become due hereunder, less the unearned portion of the finance charge" is contrary to the regulations.

The quoted portion of the regulations, however, refers to the content of the notice of default, not to the provisions of the

contract. There is no allegation that GECC sent the Grants a notice of default with language contrary to that of 12 C.F.R. § 590.4.

Provisions Concerning Right to Cure Default

The Grants argue that because 12 C.F.R. § 590.4(h) requires that a debtor be given the right to cure any default for 30 days, and because notice of that fact must be communicated to the debtor, the GECC contract's reference to an undefined "notice of right to cure" is inadequate. Again, however, the Grants take the regulation's requirements for the notice of default and attempt to apply them to the terms of the contract itself. The regulation does *not* provide that "no contact qualifies for preemption" unless it discloses the 30-day notice, but rather that "no action . . . to accelerate . . . may be taken" without the notice. 12 C.F.R. § 590.4(h); *see Quiller*, 727 F.2d at 1070. Thus, the notice section of the regulations is in direct contrast with other sections of the regulations which expressly require disclosure of certain information within the loan contract. *See* 12 C.F.R. § 590.4(d) ("The right to prepay shall be dislosed in the loan contract . . "); *id.* § 590.4(f) ("No late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and debtor"). As the *Quiller* court held, 12 C.F.R. § 590.4(h) does not require creditors to recite in the loan contract the specific rights of a defaulting debtor. 727 F.2d at 1070.

Right to Notice Prior to Repossession or Foreclosure

The Grants contend that the Act itself requires that preemption contracts disclose a defaulting debtor's right to 30 days notice prior to repossession or foreclosure. The GECC contract is silent with regard to foreclosure and repossession. Thus, in the absence of express contractual terms authorizing conduct contrary to federal law, this argument is foreclosed by our holding in *Quiller* that "to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure." 727 F.2d at 1071.

Although the Grants have not claimed that the GECC contract contains terms or conditions contrary to the right to a 30-day notice prior to repossession or foreclosure, they contend that absence of any reference to that right permits the creditor to repossess without notice by operation of Georgia law. In Georgia, a creditor may repossess by self help without notice unless the contract contains a specific provision to the contrary. O.C.G.A. § 11-9-503; *see also Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978). A creditor may also foreclose upon 7-days notice pursuant to a judicial writ of possession. O.C.G.A. § 44-14-231, -232(b). The Grants' argument fails for the simple reason that the issue before us is not what Georgia law requires, but what the federal preemption scheme requires, as there appears to be no question of fact as to whether the parties intended to enter a federal preemption contract.

We recognize that in individual cases the lack of specific contract language might allow an unscrupulous creditor to foreclose or repossess without notice by preying on consumers unaware of their notice rights under federal law or by litigating before state court judges who might interpret the agreement under Georgia law due to unfamiliarity with the complexities of the federal preemption scheme. But there is no allegation that GECC conducted its business in such a manner. Such an argument would convert the law into a disclosure act. Arguments for such a change must be addressed to the FHLBB or Congress, not to this Court.

Right of Prepayment Without Penalty

As a final challenge to the contract itself, the Grants focus on the requirement of 12 C.F.R. § 590(d):

> A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document.

The Grants argue that type size of the print was not larger than that used in the body of the contract. A review of the contract

reveals that the prepayment clause is set in type clearly larger than that of the text surrounding it which comprises the "body" of the contract. Although certain headings and clauses in other parts of the contract are set in larger or bolder type, the type size used here is larger than "the body of the document" and fulfills the regulation's purpose to call attention to the provision. *See* 45 Fed.Reg. 43684 (June 30, 1980). The regulation does not require the disclosure in the largest type used in the instrument.

Significantly, the version of 12 C.F.R. § 590.4(d) originally proposed by the FHLBB required that the prepayment clause be "conspicuously disclosed in the loan contract." 45 Fed.Reg. 31124 (May 5, 1980). The FHLBB replaced that phrase with the current type-size requirement because "the Board agree[d] that [the "conspicuous" requirement] may be potentially troublesome." 45 Fed.Reg. 43684 (June 30, 1980). This litigation demonstrates that the alteration in the regulations failed to eliminate "troublesome" disputes.

Defendant's Failure to Show Loan's Entitlement to Federal Preemption

As an alternative ground for reversal, the Grants urge that GECC made no showing that the financing transaction was a "federally related mortgage loan" eligible for preemption under the Act. Throughout the proceedings in the district court, however, the Grants never suggested that given an appropriate contract this financing transaction would fail to qualify for preemption. For instance, in their complaint plaintiffs admitted that "[f]ederal law would have allowed additional interest to be charged had the lender complied with certain prerequisites specified in the federal statute," and then proceeded to enumerate the alleged contractual shortcomings. The closest the Grants came to raising the "federally related mortgage loan" argument in the district court was in their opposition to GECC's motion to dismiss, which remarked:

> Defendant has made no showing in that regard but assuming, for the sake of argument, that the transaction would

> meet the definition of a "federally-related mortgage loan," the next question is whether the terms and conditions of the credit sales contract allow it to be preempted from the state law that would normally govern.

Aside from this isolated statement, which hardly amounts to much more than conceding the issue, the Grants never mentioned, much less argued, to the district court that their financing transaction could not come under the Act. The thrust of the complaint and other papers filed there reflect only the central argument that the "terms and conditions" of the GECC contract failed to satisfy the requirements of the Act and regulations. Having failed to raise the issue before the district court, the Grants cannot raise the issue for the first time on appeal. *See Case v. State Farm Mutual Automobile Insurance Co.*, 294 F.2d 676, 678 (5th Cir. 1961).

Conclusion

The provisions of the GECC contract before us differ significantly from those in the contract found to be contrary to the federal statute and regulations in *Quiller*. We held that the language in the *Quiller* contract inaccurately stated the creditor's rights under the federal preemption scheme by permitting the creditor (1) to foreclose on the loan "without notice," (2) to repossess "without notice or demand for performance or legal process;" and (3) to demand payment of the full balance upon the debtor's default or the creditor's insecurity "without notice." 727 F.2d at 1072. The contract's qualification that these express contractual powers of the creditor were "subject to any notice of right to cure" was held to be vague and equivocal, and in any event, inconsistent with the three specific reservations of creditor's rights to be exercised "without notice." In contrast, GECC's contract makes no mention of the creditor's right to foreclose or repossess upon the debtor's default, nor does it purport to assume such powers in the event of the creditor's general "insecurity." The only specific reservation that GECC did make concerns the right to accelerate upon default. This right is expressly conditioned in clear, mandatory terms upon

the debtor's receipt of notice of right to cure default prior to acceleration. In sum, the affirmative misrepresentations of the debtor's federal statutory guarantees that existed in the agreement in *Quiller* are not present in the GECC contract.

Having held that the "terms and conditions" of the GECC contract satisfied the prerequisites for obtaining the protection of the Federal preemption scheme, we need not address defendant's argument that the Grants' state law claim is foreclosed by Georgia's one-year statute of limitations for usury actions. The order of the district court dismissing the Grants' complaint is therefore

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting, with whom GODBOLD, Chief Judge, and VANCE, Circuit Judge, join:

I respectfully dissent. In *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1985) (en banc), this court reinstated the panel's opinion which held that a contract containing terms contrary to the requirements of the Depository Institutions Deregulation and Monetary Control Act, 12 U.S.C. § 1735f-7 (note), and regulations promulgated thereunder, is not entitled to the protection of federal preemption of state interest rate ceilings. In this case, the majority perceives sufficient distinctions between the language of the *Quiller* contract and the one under scrutiny here to warrant assertion of the preemption defense. Although I agree that General Electric Credit Corporation's (GECC) contract does not suffer from the same defects as the *Quiller* contract, I disagree with the majority's conclusion that GECC's contract is entitled to protection under the federal preemption scheme.

In *Quiller*, we began our analysis of the contract by admonishing that "we should examine the contract through the eyes of the typical consumer and determine whether the lender could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights." 727 F.2d 1061 at 1071. This rule of interpretation is consistent with

Congress's decision to include manufactured home financing in the preemption scheme only on the condition that consumer-debtors would enjoy certain protections under finance agreements. Further, we determined that it would be unrealistic to assume that all inaccurate statements of rights and actions taken pursuant thereto would be remedied through litigation. Although we concluded that to qualify for preemption a financing agreement need not contain an express term guaranteeing the debtor thirty days notice prior to repossession or foreclosure, we held that contracts that affirmatively allowed a creditor to take action inconsistent with the debtor's right to notice and right to cure were not federal preemption agreements. *Id.* at 1072.

GECC's credit agreement provides in part:

> In the event of Buyers' default in payment when due, Seller may declare *immediately* due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Deferential calculated by the Pro-Rata Method *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right* . . .

(emphasis in italics added). Because the contract grants the creditor the right, upon default, to accelerate immediately payment of any and all installments, it is contrary to 12 C.F.R. § 590.4(h), which prohibits initiation of any action to accelerate payments until 30 days after the creditor sends the debtor a notice of default and right to cure. Further, section 590.4(h) provides that the "sum stated in the notice of default may only include payments in default and applicable late or deferral charges . . ." A provision allowing *all* future payments to become due *immediately* upon default is thus an inaccurate statement of the creditor's rights, in that under section 590.4(h), the debtor has the right to cure the default, by paying the amount in default plus any late charges, *before* the creditor may accelerate payments.

The majority relies on the qualifying clause ("provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right") to conclude that the contract unambiguously informs the debtor of the right to cure the default before the creditor may accelerate payments. Although this provision is not as vague or equivocal as the qualifying clause in the *Quiller* contract, 727 F.2d at 1071-72, in my view it fails to remedy the inaccurate statement of rights already conveyed by the agreement. Read as a whole, the challenged passage could be fairly construed by a consumer-debtor to transmit conflicting messages: the creditor's right to declare immediately upon default that all installments are due, and the debtor's right to cure before the creditor exercises that right. Moreover, there is no explanation that the right to cure means paying only the amount in default plus any late charge. As the majority observes, there is no requirement that this be explained in the contract; yet, given the creditor's right under the contract to accelerate immediately upon default, the unexplained right to cure fails to offer a statement sufficient to qualify the agreement as a preemption contract.[1] As in the

[1]In an effort to reconcile the GECC contract with section 590.4(h), the majority explains that the portion of the regulation setting forth the amount due upon default refers only to the notice of default, not to provisions that must be contained in a preemption contract. 727 F.2d at 1070. I believe the majority overlooks the fact that the agreement grants the creditor the right to accelerate payments immediately upon default. The regulation provides that the sum stated in the notice of default may not exceed the amount in default plus an applicable late charge; thus, a creditor is forbidden to accelerate payments immediately upon default of one payment. The debtor must have the opportunity to cure by paying the amount stated in the notice of default.

Twice the majority observes that there is no allegation that GECC sent the Grants a notice of default that contradicted the form set forth in the regulations. 727 F.2d at 1071. This ignores *Quiller's* focus on the language of the agreement. To await the creditor's actual performance upon default would allow a creditor who drafts a contract that contradicts every right granted to the consumer-debtor by the regulations to claim a preemption defense if there is no effort to enforce the unlawful provision unless the debtor filed a lawsuit. As we observed in *Quiller*, "It would be unrealistic to assume that every illegal act will be corrected through litigation." 727 F.2d at 1071 (citing *General Finance Corp. of Georgia v. Sprouse*, 577 F.2d 989 (5th Cir. 1978)).

Quiller contract, a debtor who reads this provision may receive an accurate impression of his or her rights upon default, if he or she had independent knowledge of the applicable statute and regulations. Absent this, however, a debtor could easily conclude that the creditor can accelerate immediately upon default, subject to some unspecified right to cure. At best, the language of the agreement is ambiguous.[2]

The focus of our *Quiller* decision was to prevent creditors from exercising leverage over unwary consumer-debtors faced with default. Congress sought to ensure that consumer-debtors would not immediately lose their homes upon the failure to tender a single payment on time, by guaranteeing the debtors' right to cure and right to notice before repossession, foreclosure or acceleration. I do not believe that GECC's credit agreement fulfills this purpose. Accordingly, I would hold that the GECC contract is not entitled to the benefits of federal preemption.

---

[2]Language, of course, can be inherently ambiguous, and some debtors may not understand their rights under an agreement no matter how clear the terms. Nonetheless, although the statute and regulations do not require that certain provisions be set forth explicitly in an agreement, the onus is on the creditor who wishes to claim the preemption defense to draft a document that does not contradict rights guaranteed by the regulations. When doing so, the creditor must employ language that makes the contract readily understandable by a reasonable consumer-debtor. *Quiller*, 727 F.2d at 1071. *Cf. Jeter v. Credit Bureau*, 760 F.2d 1168 (11th Cir. 1985) (to determine whether Fair Debt Collection Practices Act has been violated, court is obligated to decide whether least sophisticated consumer would be deceived, mislead, or harassed by creditor's actions).

APPENDIX B

JACK GRANT, JR., EVELYN H. GRANT, and all other persons similarly situated,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC CREDIT CORPORATION,

Defendant-Appellee

No. 83-8456

United States Court of Appeals,
Eleventh Circuit.

March 19, 1984.

Opinion on Granting of Rehearing En Banc May 22, 1984.

[Reported at 727 F.2d 1073 (1984)]

Appeal from the United States District Court for the Southern District of Georgia.

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

PER CURIAM:

Plaintiff-appellants purchased a mobile home from Hutchinson Homes, Inc. in February 1982. The parties entered into a retail installment sales contract on a form prepared by the defendant-appellee, General Electric Credit Corporation (GECC), which obtained the contract by assignment from Hutchinson shortly after the Grants took possession of the home. The rate of interest on the contract exceeded an add-on rate of 13.6%, 3.6% higher than the maximum finance charge on mobile home contracts allowed under the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982).

The Grants filed a complaint in the District Court for the Southern District of Georgia on behalf of themselves and a class of all persons similarly situated, seeking damages and injunctive relief for the alleged violation of Georgia law. In addition to setting forth the state law claim, the complaint attempted to refute an anticipated defense that the high interest rate was valid under § 501 of the Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, Title V, 94 Stat. 161 (1980) (codified at 12 U.S.C. § 1735F-7 note) (the "Act"), which preempts state usury laws governing mobile home financing if the lender complies with certain consumer protection regulations. Attached to the complaint was a copy of the financing agreement. After a hearing on defendant's motion to dismiss for failure to state a claim, the district court dismissed the action, concluding that the Act governed the contract and that the finance charge was thus protected under federal law. We reverse.

The Grants alleged in their complaint and maintain on appeal that GECC did not comply with the conditions imposed by the Act and the implementing regulations, and that the contract is therefore governed by Georgia law. Specifically, they contend that the contract impermissibly allows GECC to immediately declare the entire contract due and payable upon the buyer's default without giving the debtor thirty days notice and right to cure as provided in the Act and 12 C.F.R. § 590.4(h) (1983).[1]

This case is controlled by our decision in *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (1984), where we held that although neither the Act nor the regulations requires the lender to include a thirty-day notice provision in the financing agreement, if the contract contains a term or condition incon-

---

[1]In an amended complaint filed shortly before the district court rendered its decision and in their appeal to this court, the Grants have alleged additional reasons why their contract does not comply with federal law. Because we decide *infra* that the Grants are entitled to a reversal of the district court's dismissal based upon the contract's failure to accurately state the creditor's right to accelerate, we need not decide the validity of their other contentions.

sistent with the regulations, the creditor may not obtain the benefits of the federal statute.

Section 501(c) of the Act authorizes the preemption of state usury limits only if the "terms and conditions" of the loan agreement comply with the consumer protection regulations promulgated by the Federal Home Loan Bank Board. The regulation applicable to this contract provides:

> *[N]o action to repossess or foreclose, or to accelerate payment* of the entire outstanding balance of the obligation, *may be taken* against the debtor *until 30 days after the creditor sends the debtor a notice of default* . . . In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges . . . .

12 C.F.R. § 590.4(h) (1983) (emphasis added).

The Grants' contract provides in part:

> In the event of Buyer's default in payment when due, Seller may declare *immediately* due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Deferential calculated by the Pro-Rata Method *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right* . . .

This passage is directly contrary to the statute and § 590.4(h) of the regulations because it grants the creditor the right, upon default, to immediately accelerate payment of any and all installments due or to become due under the contract. The regulation unequivocally forbids the creditor from immediately demanding all installments due and payable upon default; it can only do so thirty days after the creditor sends the debtor notice of default and right to cure. Moreover, the regulation provides that the sum stated in the notice may only include payments in default plus any applicable late charges. The creditor may not, as this contract allows, declare all installments due and payable

as soon as the debtor defaults one payment. A provision allowing all future payments to become due immediately upon default is an inaccurate statement of the creditor's rights in the federal scheme.

The qualifying clause here ("provided that Buyer shall be given notice of right to cure. . . .") may more accurately inform the debtor of his absolute right to notice than did the qualifying clause in *Quiller*,[2] but the clause does not remedy the inaccurate statement of the creditor's power already conveyed. The passage transmits two conflicting messages: the creditor's right to declare all installments immediately due and payable and the debtor's right to cure before the creditor exercises that right. As in the *Quiller* contract, a debtor reading this provision might receive an accurate impression of his rights if he is aware of the federal statute, but absent this outside knowledge, the debtor can only conclude that the creditor may accelerate immediately upon default, subject to some unspecified right to cure.

Since § 590.4(h) forbids immediate acceleration, the contract does not comply with the regulation. When a financing agreement includes a term that is inconsistent with one of the Act's implementing regulations, the applicability of state law to the contract is not preempted. We therefore reverse the district court's dismissal of the complaint. REVERSED and REMANDED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent for the reasons stated in my dissent in *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1072 (11th Cir. 1984).

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDER-

[2]The contract in *Quiller* allowed the lender to foreclose, repossess or accelerate payment "without notice, subject to any notice of right to cure . . ." 727 F.2d at 1071 (1983) [sic].

SON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges of this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX C

ARTHUR QUILLER, LILLIE MAE QUILLER, and all other persons similarly situated,

Plaintiffs-Appellants,

v.

BARCLAYS AMERICAN/CREDIT, INC.,

Defendant-Appellee

No. 83-8455

United States Court of Appeals,
Eleventh Circuit
July 8, 1985.

[Reported at 764 F.2d 1400 (1985)]

Appeal from the United States District Court for the Southern District of Georgia

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, and ANDERSON, Circuit Judges.*

PER CURIAM:

Arthur and Lillie Mae Quiller filed a class action against Barclays American/Credit, Inc., in the Superior Court of Richmond County, Georgia, alleging a violation of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982). After removing the case to the United States District Court for the Southern District of Georgia, Barclays moved to dismiss for failure to state a claim, contending *inter alia* that the action was precluded by the Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (1980) (codified at 12 U.S.C. § 1735f-7 note). The district court granted Barclays' motion to

---

*Judge Thomas A. Clark, recused himself and did not participate in this decision.

dismiss, but a panel of this court reversed the order of dismissal and remanded the case for further proceedings. *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984).

On rehearing *en banc*, we agree with the panel's disposition of the case. We therefore affirm and reinstate the panel opinion. The district court's order granting Barclays' motion to dismiss is REVERSED, and the case is REMANDED for further proceedings.

RONEY, Circuit Judge, dissenting, with whom TJOFLAT, JAMES C. HILL, FAY and R. LANIER ANDERSON, III, Circuit Judges, join:

The Court holds *first* that the contract is expressly contrary to the federal statute and regulations comprising the federal preemption scheme because it permits the creditor to foreclose, repossess, or accelerate upon the debtor's default "without notice" and *second*, that the plaintiff is entitled to the remedies available under Georgia usury law. I dissent from both of these decisions. Although not a model of clarity, the contract is not necessarily contrary to the federal scheme. The provisions of the contract are at worst ambiguous. Being ambiguous, the contract cannot be held invalid on a motion to dismiss. To the extent the contract is contrary to the conditions required by federal preemption law, there are more suitable remedies that the district court should consider before giving the plaintiff the state usury remedies.

I

As to the provisions of the contract, there are substantial arguments that the contract does not violate the law at all. As noted by the Federal Home Loan Bank Board (FHLBB) in its amicus curiae brief, both the preemption Act and the agency regulations provide circumstances in which the creditor may repossess, accelerate, or foreclose "without notice." The Act directs FHLBB to issue a regulation that requires

> a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances).

Pub.L. No. 96-221, Title V, § 501(c)(2), 94 Stat. 161 (1980) (codified at 12 U.S.C.A. § 1735F-7 note). The implementing regulations provide:

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. . . The debtor is not entitled to notice of default more than twice in any one-year period.

12 C.F.R. § 590.4(h)(1). Thus, in three separate situations a creditor may in fact accelerate, repossess, or foreclose without giving the 30-day notice otherwise required under section 590.4(h): (1) abandonment; (2) other extreme circumstances; and (3) upon the debtor's third default in a one-year period. Consequently, the contract's assertion that creditor may take action "without notice" upon debtor's default is not, as the court suggests, an "affirmative misrepresentation as to [the debtor's] statutory guarantees." 727 F.2d at 1072.

In all other default situations, the creditor is required to give the 30-day notice. The contract provides that the creditor's express powers to foreclose, accelerate, or repossess are "subject to any notice of right to cure." The court notes that "[t]he qualification would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure." 727 F.2d at 1072 (emphasis in original). As pointed out above, however, the right to cure is not "absolute" in at least three specified circumstances. Given that the court concedes that the qualifying clause informs the debtor that he *may* have a right to cure, that is all that is necessary. For the court to hold that the creditor had to use language more specific than "subject to any notice of right to cure" undercuts

the court's holding that "to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure." 727 F.2d at 1071.

It would be inconsistent with federal law for a preemption contract to claim an unqualified right to acceleration, repossess, or foreclosure "without notice." But because in some situations a creditor may indeed exercise such powers without notice, it is not inconsistent with federal law for a preemption contract to claim such a right "subject to any notice of right to cure," the express qualification contained in the Quiller contract. The contract language therefore does not prevent the loan from meeting the "terms and conditions" of the federal statute and regulations.

II

At most the contract would be ambiguous. With that determination, the court should remand for the district court to determine the intent of the parties. The contract was written to be a federal preemption contract. The words "FEDERAL PREEMPTION CONTRACT" appear in the contract in the bottom left corner of the very same page as the language held to be contrary to the federal preemption scheme. The conduct of the parties, the intention to make the agreement a federal preemption contract, and the intent of the borrower to make a legal contract and to pay the higher interest rate become relevant.

In holding that the agreement is contrary to the statute and regulations, the court characterizes the offending provisions as "inaccurate statements of the creditor's rights under federal law." *Id.* at 1072. Be that as it may, the contract does contain the "vague qualification" that its claimed powers to immediately foreclose, repossess, and accelerate are "subject to any notice of right to cure." The court acknowledges that "[t]he qualification would, at most, inform the debtor that he *may* have a right to cure." *Id* at 1072 (emphasis in original). In view

of the ambiguity created by this "inconsistent language," this case should be remanded to the district court to conduct an evidentiary hearing, if necessary, to determine whether the parties intended to enter a federal preemption contract, and, if so, what was intended by the ambiguous language.

This is not to say, however, that the creditor could receive the benefits of federal preemption were it in fact to exercise its powers upon a debtor's default in a manner inconsistent with the federal statute and regulations. Nor would contract language that, unlike the language in the contract here, was indeed contrary to the consumer protections provided by the Act and regulations be saved by a creditor's actual compliance with the Act and regulations. The case before us, however, on appeal from the district court's order granting defendant's motion to dismiss, presents neither of those situations.

III

Once the "terms and conditions" are established, then the relief a party is entitled to obtain in court is to have the contract enforced according to those "terms and conditions." For a class, this may either be a declaratory decree or an injunction requiring the creditor to follow the contract's "terms and conditions."

In any event, the problem with notice might be easily curable by remedies not as harsh as that held by the court. At most, the case should be remanded to the district court to consider remedies that would preserve the bargain the parties intended to make. There is no question but that the parties intended to contract for a legal interest rate under the federal preemption law. The Georgia law of usury under O.C.G.A. § 10-1-33 makes the civil penalties of the Georgia Motor Vehicle Sales Finance Act applicable:

> A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

O.C.G.A. § 10-1-38(b). Asserting that the violation was wilful, the Quillers seek to recover double the time price differential under O.C.G.A. § 10-1-38(c). The penalty provisions do not authorize forfeiture of the unpaid principal of loans held violative of section 10-1-33. *See Bozeman v. Tifton Federal Savings & Loan Ass'n*, 164 Ga. App. 260, 297 S.E.2d 49 (1982); *Kelly v. Sylvan Motors, Inc.*, 160 Ga. App. 420, 287 S.E.2d 359, 360 (1981); *Ford Motor Credit Co. v. Spann*, 153 Ga. App. 535, 265 S.E.2d 863, 865 (1980); *Cook v. First National Bank*, 130 Ga. App. 587, 203 S.E.2d 870, 871 (1974); *see also Barrett v. Vernie Jones Ford, Inc.*, 395 F.Supp. 904, 909 (N.D. Ga. 1975), *aff'd*, 578 F.2d 1185 (5th Cir. 1978). Georgia law indicates that the lender may recover this principal through the borrower's continued payments under the contract, unless the borrower was still in default after adjustment had been made to account for the forfeiture of the finance charge. *See Spann*, 265 S.E.2d at 865; *Bozeman*, 297 S.E.2d at 52. Nevertheless, the penalty sought by the Quillers would be harsh in a case where both parties intended to enter into a federal preemption contract governed by federal preemption law, under which the finance charge charged by Barclays/American and agreed to by the Quillers was legal.

Rather than applying state usury laws to require forfeiture of the finance charge, a more equitable remedy might be to invalidate the provisions contrary to federal law and enjoin enforcement of such provisions if necessary to protect the consumer. Such an approach was taken by this Court in a case where a provision of a loan contract violated regulations promulgated under the Georgia Industrial Loan Act. *Robinson v. Central Loan and Finance Corp.*, 609 F.2d 170, 175 (5th Cir. 1980). Severance of the objectionable provisions of the loan contract would be consistent with the "well known principle of contract law that an illegal contract provision, or one contrary to public policy, when invalidated, will be severed from the remainder of the contract if it is possible to do so without leaving the remainder of the contract meaningless." *Vineberg v. Brunswick Corp.*, 391 F.2d 184, 186 (5th Cir. 1968). The

provisions of the contract held to be contrary to federal regulations certainly could be severed from the contract before us without rendering it meaningless, especially in light of the fact that the contract before us contained a severability clause providing:

> If any part of this contract is invalid, unenforceable or inconsistent with the applicable laws or regulations of the State of Seller's address herein, such part shall be deemed amended, modified or deleted to conform thereto.

The Quillers contend that *Harrison v. Goodyear Service Stores*, 137 Ga. App. 223, 223 S.E.2d 261 (1976), and *General Finance Corp. v. Sprouse*, 577 F.2d 989 (5th Cir. 1978), support application of the forfeiture provisions of O.C.G.A. § 10-1-38 in this case. In those cases, however, there was no dispute that the parties intended to enter contracts governed by Georgia law. *See Harrison*, 223 S.E.2d at 263 (contract governed by Georgia Retail Installment and Home Solicitation Sales Act); *Sprouse*, 577 F.2d at 991 (parties agreed contract was governed by Georgia Industrial Loan Act). Both decisions penalized creditors for charging or contracting to charge interest rates in excess of the statutory maximum under Georgia law. In contrast, in the case before us, the creditor contracted for a finance charge that was clearly permissible under federal law if the terms and conditions of the loan contract complied with federal law. In the event the district court finds that the parties intended to enter a legal contract under federal law, *Harrison* and *Sprouse* present no obstacle to a severance and injunctive remedy that would conform the terms and conditions of the contract to federal law rather than forfeiture of the finance charge. Thus, even if the terms and conditions of the loan contract were contrary to federal law, the proper remedy would be to enjoin enforcement of those provisions absent any evidence that the creditor intended to enforce the illegal terms.

JAMES C. HILL, Circuit Judge, dissenting, with whom, FAY and R. LANIER ANDERSON, III, Circuit Judges, join:

I wholeheartedly concur with Judge Roney in his dissent, and write here only to express my fears that the court's treat-

ment of this preemption loan agreement forecasts an excursion into hypertechnical "gamemanship" similar to that apparent in litigation under the Truth-in-Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*

The usury preemption act was passed in 1980 during a time of historically high interest rates, when consumers who wished to purchase premanufactured homes were unable to obtain financing because financial institutions were unwilling to lend money for their purchase at the relatively low statutory interest levels prevailing in many states. In passing the preemption act, Congress constructively undertook to ease the severity of the mortgage credit crunch and insure the availability of mortgage credit in these states. S.Rep. No. 96-368, 96th Cong., 2d Sess. 18-19 (1979), *reprinted in* 1980 U.S. Code Cong. and Ad.News 236, 254-55. Although Congress concluded that purchasers of financing for premanufactured homes were entitled to additional consumer protections in order for their mortgages to fall within the preemption act, there is no doubt that the overriding objective of the act was to assist both borrowers and lenders by freeing up additional credit for housing. This was not intended to be a consumer protection disclosure act.

The majority opinion does not further the constructive purpose of the preemption act. The court holds that a lender loses the protection of the preemption act and is subject to the forfeiture provisions of state usury laws on the basis of a contractual provision which is, at the most, merely ambiguous; even though both parties intended to enter into a federal preemption contract governed by federal law. This encourages a TILA-like game of "gotcha," where a borrower who wishes to serve as a class representative subjects the contracts to microscopic examinations to determine if it might be possible to claim damages for perceived disclosure violations in a situation where no "unwary" consumer has been misled. *See Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1385-86 (11th Cir. 1984) (TILA violation) (Hill, J., dissenting).

The approach taken in the dissent authored by Judge Roney would further the purpose underlying the preemption legisla-

tion, while at the same time protecting the borrower from any violation of the federal act. A borrower can be adequately protected from actual violations of the act when and if they occur, at which time a counter-claim along the lines of the present action might be entertained. However, the sort of search for errors in draftsmanship upon which claims of violations might be predicated, encouraged by the court in this case, constitutes the court's enmity to the preemption act and a judicial attempt to defeat its purposes. Such "gamesmanship," permitted by the court, has made what I perceive to be a mockery of the truth-in-lending laws. I hope that we do not travel down that road again in connection with this very useful law.

APPENDIX D

ARTHUR QUILLER, LILLIE MAE QUILLER, and all other persons similarly situated,

Plaintiffs-Appellants,

v.

BARCLAYS AMERICAN/CREDIT, INC.

Defendant-Appellee.

No. 83-8455

United States Court of Appeals,
Eleventh Circuit.

March 19, 1984.

Opinion on Granting of Rehearing
En Banc May 22, 1984.

[Reported at 727 F.2d 1067 (1984)]

Appeal from the United States District Court
for the Southern District of Georgia.

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

To finance their purchase of a new mobile home, plaintiff-appellants entered into a retail installment sales contract, which the mobile home dealer then assigned to the defendant-appellee credit corporation, Barclays American/Credit, Inc. The Quillers' agreement obligated them to pay finance charges exceeding a thirteen percent add-on rate, in apparent violation of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982), which limits the finance charge on sales of new mobile homes to a ten percent add-on. Alleging a violation of the Georgia Code, plaintiffs filed a class action against Barclays in the Superior Court of Richmond County, Georgia, seeking class certification, a declaratory judgment

barring the defendant from collecting any finance charges from the named plaintiffs and all other persons similarly situated, and damages in an amount double the time-price differential for wilful violation of the Georgia act. Barclays then removed the case to the United States District Court for the Southern District of Georgia.

The applicability of state usury laws, however, has been greatly curtailed by federal legislation. Financing agreements that satisfy the requirements of the Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (1980) (codified at 12 U.S.C. § 1735f-7 note) (the "Act"), are exempt from state law interest ceilings. The Quillers' complaint alleged that their contract was not insulated from the ceiling imposed by the Georgia statute because the agreement did not comply with the prerequisites for preemption under federal law. Specifically, they charged that their contract did not contain a provision requiring the lender to notify the debtor thirty days prior to instituting any action leading to repossession or foreclosure, thus violating the Act and one of the regulations promulgated thereunder, 12 C.F.R. § 590.4(h) (1983). Attached to the complaint was a copy of the installment sales contract.

Barclays moved to dismiss for failure to state a claim, contending that the cause of action was barred as a matter of law by the Act and the statute of limitations. Pretermitting the statute of limitations question, the district court dismissed the action as precluded by the federal statute. We disagree and reverse the order dismissing the Quillers' claim.

Our threshold inquiry is whether the district court's dismissal was procedurally premature. The Quillers' contract states a claim for relief under Georgia law—the charging of a usurious interest rate, which, if proved, would entitle them to relief for violation of the Georgia Motor Vehicles Sales Finance Act. Barclays' Rule 12(b)(6) motion alleges the affirmative defense of federal preemption of the Georgia statute. Generally, the existence of an affirmative defense will not support a motion to

dismiss. Nevertheless, a complaint may be dismissed under Rule 12(b)(6) when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint. *See, e.g. Concordia v. Bendekovic*, 693 F.2d 1073 (11th Cir. 1982) (party may raise affirmative defense of res judicata by 12(b)(6) motion when defense's existence may be judged on face of complaint); *Mann v. Adams Realty Co.*, 556 F.2d 288, 293 n. 6 (5th Cir. 1977) (defense of statute of limitations may appear on face of complaint); *see generally* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357 (1969). The claim may be adequately stated, as it is here, but in addition to the claim the complaint may include matters of avoidance that preclude the pleader's ability to recover. When this occurs, the complaint has a built-in defense and is essentially self-defeating. "[T]he problem is not that plaintiff merely has anticipated and tried to negate a defense he believes his opponent will attempt to use against him; rather plaintiff's own allegations show that the defense exists." *Id.* Although the Quillers' complaint would not be vulnerable to dismissal simply because they anticipated and attempted to negate the defense of federal preemption, if the complaint itself demonstrates that the Act governs the contract, a Rule 12(b)(6) dismissal would be proper.

Because the Quillers attached the installment sales contract to their pleadings, the district court properly examined the document to determine whether the defense of federal preemption was apparent on the face of the complaint. If the contract and complaint demonstrate that Georgia law does not apply because the agreement is governed by the Act, the action should be dismissed because it would appear beyond doubt that the Quillers could prove no set of facts in support of their claim. The district court therefore was procedurally correct in looking at the contract to determine whether it complied with the requirements of the federal statute.

Turning to the substance of the motion to dismiss, we first observe that the Act preempts state law limits on finance charges for sales of residential manufactured homes only if the

financing arrangement complies with certain consumer protection regulations. Section 501(c) of the Act provides that the statute

> *shall not apply* to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home *unless the terms and conditions relating to such loan*, mortgage, credit sale, or advance *comply* with *consumer protection provisions* specified in regulations prescribed by the Federal Home Loan Bank Board. *Such regulation shall*— . . . .
>
> (2) *require a 30-day notice* prior to instituting any action leading to repossession or foreclosure. . . .
>
> and (4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

Pub.L. No. 96-221, Title V, § 501(c) (emphasis added).

The regulation implementing subsection (c)(2) states:

> *[N]o action to repossess or foreclose, or to accelerate payment* of the entire outstanding balance of the obligation, *may be taken* against the debtor *until 30 days after the creditor sends the debtor a notice of default* . . .

12 C.F.R. § 590.4(h) (1983) (emphasis added). The Quillers alleged in their complaint and maintain on appeal that the statute and regulation require the financing agreement to include a provision guaranteeing the debtor thirty days notice before repossession or foreclosure. Since their agreement contains no such clause, they contend that the contract is not protected under the preemption statute and thus is governed by Georgia law.[1]

---

[1]On appeal the Quillers have argued additional reasons why their contract fails to qualify for protection under the Act. Since we decide *infra* that Barclays is not entitled to the benefits of federal preemption because the contract contravened the federal notice requirements, we need not decide the validity of the Quillers' other arguments.

We reject the Quillers' interpretation of the statute and regulation. Neither requires that a thirty-day notice provision appear in the contract. The plain language of the regulation prohibits only the *act* of foreclosure or repossession without giving notice. The words "no action . . . may be taken" regulate the conduct of creditors attempting to exercise their rights upon default, not the written financing agreements themselves. When subsection 590.4(h) is read in conjunction with other regulations implementing the Act, it becomes clear that the Federal Home Loan Bank Board (the "Board") did not intend to require that the debtor's right to thirty days notice be recited in the contract. Subsection 590.4(d) (prepayment without penalty),[2] (e) (terms of balloon payments),[3] (f) (late charges),[4] and (g) (agreement for deferral of fees)[5] all contain express, unambiguous statements requiring specific rights of the debtor to be delineated in the written agreement. Subsection (h) contains no similar requirement. If an express contractual notice provision had been intended, the Board would have so provided in unambiguous terms.

Nor does the statute itself require a contractual notice provision. It states only that a loan does not qualify for federal protection unless the terms and conditions relating to such a

---

[2]12 C.F.R. § 590.4(d) provides: "*Prepayment penalties* . . . The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document."

[3]12 C.F.R. § 590.4(e) provides: "*Balloon Payments.* (1) No creditor may enter into an agreement with a debtor which requires or anticipates a schedule for payments under which any one payment is more than twice the amount of an otherwise regularly scheduled payment . . . (3) The parties may agree in writing to payments that are not substantially equal or that are paid at unequal intervals. . ."

[4]12 C.F.R. § 590.4(f) provides: "*Late Charges.* (1) No late charge may be assessed, imposed, or collected unless provided by written contract between the creditor and debtor. . . ."

[5]5. 12 C.F.R. § 590.4(g) provides: "*Deferral Fees.* (1) With respect to mobile home transactions containing precomputed finance charges, agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties, and (i) Provide . . ."

loan comply with the consumer protection regulations of the Board. Rather than regulating the specific terms of the financing agreements, the statute delegates this authority to the Board. Although subsection (c)(2) does direct the Board to promulgate a thirty-day notice regulation, the statute does not demand that the regulation require the notice provision to appear in the contract. The Act merely requires the agreement to comply with the regulations, which do not themselves require an express notice provision.

Our construction of regulation 590.4(h) and the statute is consistent with the Board's own interpretation. An opinion letter of the Board's general counsel concludes, "This requirement [§ 590.4(h)] refers only to the act of giving notice; neither paragraph (h) nor the Congressional legislation that it implements . . . expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice." 5 Fed.Banking L.Rep. ¶ 83,027 (1983). In an amicus brief filed by the Board in this case, the agency has embraced the conclusion of its general counsel. Since the agency's view of its own regulation and the statute it oversees in not "demonstrably irrational," we would give great weight to its interpretation. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 100 S.Ct. 790, 797, 63 L.Ed1e 22 (1980); *see also Sage v. Freedom Mortgage Co.*, 704 F.2d 1519, 1521 (11th Cir. 1983) (en banc). We therefore hold that to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure.

Although federal law does not mandate a contractual notice provision, the creditor cannot obtain the benefits of preemption if the financing agreement contains express provisions authorizing conduct *contrary* to the statute or regulations. While there is no affirmative duty to disclose to the debtor his statutory right to notice before repossession or foreclosure, if the contract permits the creditor to repossess or foreclose immediately upon default, the "terms and conditions" relating to the loan agreement do not comply with regulation § 590.4(h) and the creditor cannot claim the benefits of federal preemption.

In determining whether the terms and conditions of this agreement comply with the Board's consumer protection regulations, we should keep in mind that Congress included manufactured home financing in its preemption scheme only on the condition that consumer-debtors would be guaranteed certain safeguards. *See* H.Conf.Rep. No. 96-842, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S.Code Cong. & Ad.News 298, 309. Because purchasers of mobile homes frequently are unaware of complicated rules of contract construction, we should examine the contract through the eyes of the typical consumer and determine whether the lender could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights. It would be unrealistic to assume that every illegal act will be corrected through litigation. *See General Finance Corp. of Georgia v. Sprouse*, 577 F.2d 989 (5th Cir. 1978) (when interpreting contracts in light of consumer legislation, court should consider actual operation of contract in commercial world, effect upon consumer not familiar with legal rights, and risk that contract might allow lender to employ ambiguous provisions to his advantage). The rule of construction that ambiguities and inconsistencies should be resolved against the drafter, *Landale Enterprises, Inc. v. Berry*, 676 F.2d 506 (11th Cir. 1982), is particularly appropriate in the area protected by consumer legislation.

The Quiller contract provides in part:

> If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, *the full balance may, upon election of Holder, without notice, subject to any notice of right to cure, become due and payable*, less the required rebate of the Finance Charge . . . . Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder, and Holder may, *without notice or demand for performance or legal process*, peaceably enter any premises, but not into any dwelling, where the Collateral may be found, peaceably take possession of it and custody of anything found in it.

The agreement includes language that, on its face, is contrary to the requirements of the statute and regulations. It permits the creditor (1) to foreclose on the loan "without notice;" (2) to repossess "without notice or demand for performance or legal process;" and (3) to demand payment of the full balance upon the debtor's default or the creditor's insecurity "without notice." These provisions are inaccurate statements of the creditor's rights under federal law. The only language that might apprise the debtor of his statutory right to notice is the vague qualification that the creditor's express, contractual powers to immediately foreclose, repossess and accelerate are "subject to any notice of right to cure." Unless the debtor has acquired knowledge of his statutory right to cure from some outside source, however, this language will not accurately notify him of his contractual rights. The qualification would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure. This inconsistent language goes further than simply remaining silent on the debtor's right to notice upon default; by declaring the creditor's unauthorized power to foreclose immediately, the consumer is given an affirmative misrepresentation as to his statutory guarantees.

Barclays contends that its contract does comply with the regulations because § 590.4(h) cannot be violated until the creditor actually forecloses, repossesses or accelerates payment without giving thirty days notice. The argument misconstrues the language of the Act and the policies behind it. The statute and regulations allow a creditor to draft a contract that does not expressly grant the debtor a right to thirty days notice. But when the contract affirmatively allows the creditor to foreclose, repossess or accelerate payment immediately upon default, subject to an undefined, potential right to cure, the "terms and conditions" relating to the loan agreement do not comply with the regulations or the statute. By authorizing immediate action upon default, Barclays has introduced a contract term that violates the Act. It may not claim the benefits of the federal law while at the same time failing to provide the

consumer protections that are the price for those benefits. We therefore hold that the Quiller contract does not qualify for protection under the preemption statute. The district court's grant of defendant's motion to dismiss on this ground is REVERSED, and we REMAND for further proceedings.

RONEY, Circuit Judge, dissenting:

I respectfully dissent from the Court's holding that the Quiller contract does not qualify for protection under the Federal Preemption Statute. I agree with the Court that the thirty-day notice provision is not required to be in the contract. I cannot agree that the remedy applied here is suitable because of the language in the contract concerning the notice requirement.

When the contract is obviously drawn and intended by all parties to permit them to take advantage of the Federal Preemption Statute, it is unduly harsh to throw the whole contract out just because it contains language which appears to violate the thirty-day notice requirement. Rather than applying state usery [sic] laws to a contract which could not have been validly made thereunder, it would be more equitable to simply invalidate this contract clause to the extent it violates the consumer regulations, and enjoin enforcement if that remedy is deemed necessary to protect the consumer.

This result would further the twin aims of the Federal Preemption Act, assuring the availability of consumer credit for the purchase of manufactured housing and according protection to consumer borrowers, without interfering so unnecessarily with a carefully conceived financing program established to meet the needs of both parties in a time of rising money costs.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDER-

SON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Court en banc *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

JACK GRANT, JR. and
MRS. EVELYN H. GRANT,

Plaintiffs

VS.

GENERAL ELECTRIC CREDIT CORP.,

Defendant

Civil Action
CV183-96

ORDER

Presently before the Court is the defendant's motion to dismiss. In support of its motion, defendant asserts that the plaintiffs' claims are barred as a matter of law by federal preemption and the statute of limitation.

Pretermitting the defendant's statute of limitations argument, I conclude, in light of the arguments heard in this matter on June 10, 1983, that the defendant's motion is well-founded. Accordingly, it is hereby GRANTED.

ORDER ENTERED at Augusta, Georgia, this *14th* day of June, 1983.

/s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

Order filed in the U. S. District Court, Augusta Division on June 15, 1983

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, Title V, § 501, March 31, 1980, 94 Stat. 161, 12 USCA § 1735f-7 note, as amended by Pub. L. 96-399, Title III, §§ 308(c)(6), 324(a),(e), Oct. 8, 1980, 94 Stat. 1641, 1647, 1648; Pub. L. 97-35, Title III, § 384, Aug 13, 1981, 95 Stat. 432, provides that:

> (a) (1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—
>
> (A) secured by a first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation, or by a first lien on a residential manufactured home;
>
> (B) made after March 31, 1980; and
>
> (C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b)) [section 1735f-5(b) of this title], except that for the purpose of this section—
>
> (i) the limitation described in section 527(b)(1) of such Act [section 1735f-5(b)(1) of this title] that the property must be designed principally for the occupancy of from one to four families shall not apply;
>
> (ii) the requirement contained in section 527(b)(1) of such Act [section 1735f-5(b)(1) of this title] that the loan be secured by residential real property shall not apply to a loan secured by stock in a residential cooperative housing corporation nor to a loan or credit sale secured by a first lien on a residential manufactured home;

(iii)the term 'federally related mortgage loan' in section 527(b) of such Act [section 1735f-5(b) of this title] shall include a credit sale which is secured by a first lien on a residential manufactured home and which otherwise meets the definitional requirements of section 527(b) of such Act [section 1735f-5(b) of this title], as those requirements are modified by this section;

(iv) the term 'residential loans' in section 527(b)(2)(D) of such Act [section 1735f-5(b) (2)(D) of this title] shall also include loans or credit sales secured by a first lien on a residential manufactured home;

(v) the requirement contained in section 527(b)(2)(D) of such Act [section 1735f-5(b)(2)(D) of this title] that a creditor make or invest in loans aggregating more than $1,000,000 per year shall not apply to a creditor selling residential manufactured homes financed by loans or credit sales secured by first liens on residential manufactured homes if the creditor has an arrangement to sell such loans or credit sales in whole or in part, or if such loans or credit sales are sold in whole or in part to a lender, institution, or creditor described in section 527(b) of such Act [section 1735f-5(b) of this title] or in this section or a creditor, as defined in section 103(f) of the Truth in Lending Act [section 1602(f) of Title 15, Commerce and Trade], as such section was in effect on the day preceding the date of enactment of this title [Mar. 31, 1980], if such creditor makes or invests in residential real estate loans or loans or credit sales secured by first liens on residential manufactured homes aggregating more than $1,000,000 per year; and

(vi) the term 'lender' in section 527(b)(2)(A) of such Act [section 1735f-5(b)(2)(A) of this title] shall also be deemed to include any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act [this chapter], and any individual who finances the sale or

exchange of residential real property or a residential manufactured home which such individual owns and which such individual occupies or has occupied as his principal residence.

(2) (A) The provisions of the constitution or law of any State expressly limiting the rate or amount of interest which may be charged, taken, received, or reserved shall not apply to any deposit or account held by, or other obligation of a depository institution. For purposes of this paragraph, the term 'depository institution' means—

(i) any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

(ii) any mutual savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

(iii)any savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

(iv) any insured credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752) [section 1752 of this title];

(v) any member as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422) [section 1422 of this title]; and

(vi) any insured institution as defined in section 408 of the National Housing Act (12 U.S.C. 1730a) [section 1730a of this title].

(B) This paragraph shall not apply to any such deposit, account, or obligation which is payable only at an office of an insured bank, as defined in section 3 of the Federal Deposit Insurance Act [section 1813 of this title], located in the Commonwealth of Puerto Rico.

(b) (1) Except as provided in paragraphs (2) and (3), the provisions of subsection (a)(1) shall apply to any loan, mortgage, credit sale, or advance made in any State on or after April 1, 1980.

(2) Except as provided in paragraph (3), the provisions of subsection (a)(1) shall not apply to any loan, mortgage, credit sale, or advance made in any State after the date (on or after April 1, 1980, and before April 1, 1983) on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the provisions of subsection (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such State.

(3) In any case in which a State takes an action described in paragraph (2), the provisions of subsection (a)(1) shall continue to apply to—

(A) any loan, mortgage, credit sale, or advance which is made after the date such action was taken pursuant to a commitment therefor which was entered during the period beginning on April 1, 1980, and ending on the date on which such States takes such action; and

(B) any loan, mortgage, or advance which is a rollover of a loan, mortgage, or advance, as described in regulations of the Federal Home Loan Bank Board, which was made or committed to be made during the period beginning on April 1, 1980, and ending on the date on which such State takes any action described in paragraph (2).

(4) At any time after the date of enactment of this Act [Mar. 31, 1980], any State may adopt a provision of law placing limitations on discount points or such other charges on any loan, mortgage, credit sale, or advance described in subsection (a)(1).

(c) The provisions of subsection (a)(1) shall not apply to a loan, mortgage, credit sale, or advance which is secured

by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall—

(1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges and deferred fees;

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge in an amount not less than the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1; and

(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

(d) The provisions of subsection (c) shall not apply to a loan, mortgage, credit sale, or advance secured by a first lien on a residential manufactured home until regulations required to be issued pursuant to paragraphs (1), (2), and (3) of subsection (c) take effect, except that the provisions of subsection (c) shall apply in the case of such a loan, mortgage, credit sale, or advance made prior to the date on which such regulations take effect if the loan, mortgage, credit sale, or advance includes a precomputed finance charge and does not provide that, upon prepayment in full, the refund of the unearned portion of the precomputed finance charge is in an amount not less the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is

less than $1. The Federal Home Loan Bank Board shall issue regulations pursuant to the provisions of paragraphs (1), (2), and (3) of subsection (c) that shall take effect prospectively not less than 30 days after publication in the Federal Register and not later than 120 days from the date of enactment of this Act [Mar. 31, 1980].

(e) For the purpose of this section—

(1) a 'prepayment' occurs upon—

(A) the refinancing or consolidation of the indebtedness;

(B) the actual prepayment of the indebtedness by the consumer whether voluntarily or following acceleration of the payment obligation by the creditor; or

(C) the entry of a judgment for the indebtedness in favor of the creditor;

(2) the term 'actuarial method' means the method of allocating payments made on a debt between the outstanding balance of the obligation and the precomputed finance charge pursuant to which a payment is applied first to the accrued precomputed finance charge and any remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation;

(3) the term 'precomputed finance charge' means interest or a time price differential within the meaning of sections 106(a)(1) and (2) of the Truth in Lending Act (15 U.S.C. 1605(a)(1) and (2) [section 1605(a)(1) and (2) of Title 15, Commerce and Trade] as computed by an add-on or discount method; and

(4) the term 'residential manufactured home' means a manufactured home as defined in section 603(6) of the National Mobile Home Construction and Safety Standards Act of 1974 [now the National Manufactured Housing Construction and Safety Standards Act of 1974 (section 5402(6) of Title 42, The Public Health and Welfare)] which is used as a residence.

(f) The Federal Home Loan Bank Board is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

(g) This section takes effect on April 1, 1980.

OCGA § 10-1-33(a) provides in pertinent part that:

(a) Notwithstanding any other law, the finance charge, exclusive of insurance and other benefits and official fees, shall not exceed the following rates:

Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made and all vehicles not previously titled — $10.00 per $100.00. per year.

OCGA § 10-1-38(b)(c) provides in pertinent part that:

(b) A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

(c) In case of a willful violation of this article with respect to any transaction, the buyer in such transaction may recover from the person committing the violation (or may set off or counterclaim in any action by such person) a minimum of $100.00 or double the time price differential and any delinquency charge and any attorneys' fees and court costs charged and paid with respect to such transaction, but the seller may recover from the buyer an amount equal to the cash price of the goods or services in such transaction and the cost of any insurance purchased by the seller for the buyer in connection therewith.

REGULATIONS

45 Fed. Reg. 31122 (May 12, 1980) (proposed May 5, 1980) provides in pertinent part:

SUPPLEMENTARY INFORMATION:

Background

The Federal Home Loan Bank Board is proposing amendments to its regulations in 12 CFR 590.4 on the

preemption of state usury ceilings on mobile home loans (*see* 45 FR 24112, April 9, 1980). At present, these regulations, which implement section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("Act"), Pub.L. 96-221, 94 Stat. 161, provide that interest rates on mobile home loans made by any covered lender after March 31, 1980, may exceed state usury ceilings if, in the event of prepayment, unearned precomputed finance charges on the outstanding loan balance are refunded to the borrower in an amount not less than that computed by the actuarial method.

The Act provides that the actuarial rebate will be the only limitation on the usury preemption with respect to mobile home loans until the Board adopts regulations requiring more extensive protections for the mobile home buyer. Once the Board adopts such regulatory provisions (which must be effective by July 30, 1980), state usury ceilings may be exceeded by a lender covered by the Act only if the loan complies with such regulations. A mobile home loan not complying with the regulations would be open to attack under state usury laws.

45 Fed. Reg. 43681 (June 30, 1980) provides in pertinent part that:

SUMMARY: The rules prescribe consumer protections which must be included in loans secured by first liens on mobile homes before such loans are eligible for the state usury law exemption contained in section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 and implementing regulations (12 C.F.R. Part 590).

45 Fed. Reg. 43681, 43682 (June 30, 1980) provides in pertinent part that:

DISCUSSION OF FINAL AMENDMENTS

Applicability. These regulations apply only when a creditor covered by the Act chooses to charge an interest rate which exceeds the state's usury limit on mobile home loans.

12 C.F.R. § 590.4 provides that:

§ 590.4 Consumer protection rules for federally-related loans, mortgages, credit sales and advances secured by first liens on residential mobile homes.

(a) *Definitions.* As used in this section:

(1) *Prepayment.* A 'prepayment' occurs upon—

(i) Refinancing or consolidation of the indebtedness;

(ii) Actual prepayment of the indebtedness by the debtor, whether voluntarily or following acceleration of the payment obligation by the creditor; or

(iii)The entry of a judgment for the indebtedness in favor of the creditor.

(2) *Actuarial method.* The term 'actuarial method' means the method of allocating payments made on a debt between the outstanding balance of the obligation and the finance charge pursuant to which a payment is applied first to the accumulated finance charge and any remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation.

(3) *Precomputed Finance Charge.* The term 'precomputed finance charge' means interest or a time/price differential as computed by the add-on or discount method. Precomputed finance charges do not include loan fees, points, finder's fees, or similar charges.

(4) *Creditor.* The term 'creditor' means any entity covered by this Part, including those which regularly extend or arrange for the extension of credit and assignees that are creditors under section 501(a)(1)(C)(v) of the Depository Institutions Deregulation and Monetary Control Act of 1980.

(b) *General.*

(1) The provisions of the Constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is secured by a first lien on a residential mobile home if a creditor covered by this Part complies with the consumer protection regulations of this section.

(2) *Relation to State Law.*

(i) In making loans or credit sales subject to this section, creditors shall comply with state and Federal law in accordance with the following:

(A) *State law regulating matters not covered by this section.* When state law regulating matters not covered by this section is otherwise applicable to a loan or credit sale subject to this section, creditors shall comply with such state law provisions.

(B) *State law regulating matters covered by this section.* Creditors need comply only with the provisions of this section, unless the Board determines that an otherwise applicable state law regulating matters covered by this section provides greater protection to consumers. Such determinations shall be published in the FEDERAL REGISTER and shall operate prospectively.

(ii) Any interested party may petition the Board for a determination that state law requirements are more protective of consumers that the provisions of this section. Petitions shall be sent to: Secretary to the Board, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, D.C. 20552, and shall include:

(A) A copy of the state law to be considered;

(B) Copies of any relevant judicial, regulatory, or administrative interpretations of the state law; and

(C) An opinion or memorandum from the state Attorney General or other appropriate state official having primary enforcement responsibilities for the subject state law provisions, indicating how the state law to be considered offers greater protection to consumers that the Board's regulation.

(c) *Refund of precomputed finance charge.* In the event the entire indebtedness is prepaid, the unearned portion of the precomputed finance charge shall be refunded to the debtor. This refund shall be in an amount not less than the amount which would be refunded if the unearned precomputed finance charge were calculated in accordance with the actuarial method, except that the debtor shall not be entitled to a refund which is less than one dollar. The unearned portion of the precomputed finance charge is, at the option of the creditor, either:

(1) That portion of the precomputed finance charge which is allocable to all unexpired payment periods as originally scheduled, or if deferred, as deferred. A payment period shall be deemed unexpired if prepayment is made within 15 days after the payment period's scheduled due date. The unearned precomputed finance charge is the total of that which would have been earned for each such period had the loan not been precomputed, by applying to unpaid balances of principal, according to the actuarial method, an annual percentage rate based on those charges which are considered precomputed finance charges in this section, assuming that all payments were made as originally scheduled, or as deferred, if deferred. The creditor, at its option, may round this annual percentage rate to the nearest one-quarter of one percent; or

(2) The total precomputed finance charge less the earned precomputed finance charge. The earned precomputed finance charge shall be determined by applying an annual percentage rate based on the total precomputed finance charge (as that term is defined in this section),

under the actuarial method, to the unpaid balances for the actual time those balances were unpaid up to the date of prepayment. If a late charge or deferral fee has been collected, it shall be treated as a payment.

(d) *Prepayment penalties.* A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document.

(e) *Balloon payments—*

(1) *Federal associations.* Federal association creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes, and such loans shall be governed by the provisions of this section and § 545.33(f) of this chapter.

(2) *Other creditors.* All other creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes to the extent authorized by applicable Federal or state law or regulation.

(f) *Late charges.*

(1) No late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and debtor.

(2) To the extent that applicable State law does not provide for a longer period of time, no late charge may be collected on an installment which is paid in full on or before the 15th day after its scheduled or deferred due date even though an earlier maturing installment or a late charge on an earlier installment may not have been paid in full. For purposes of assessing late charges, payments received are deemed to be applied first to current installments.

(3) A late charge may be imposed only once on an installment; however, no such charge may be collected for a late installment which has been deferred.

(4) To the extent that applicable State law does not provide for a lower charge or longer grace period, a late charge on any installment not paid in full on or before the 15th day after its scheduled or deferred due date may not exceed the lesser of $5.00 or five percent of the unpaid amount of the installment.

(5) If, at any time after imposition of a late charge, the lender provides the borrower with written notice regarding amounts claimed to be due but unpaid, the notice shall separately state the total of all late charges claimed.

(6) Interest after the final scheduled maturity date may not exceed the maximum rate otherwise allowable under State law for such contracts, and if such interest is charged, no separate late charge may be made on the final scheduled installment.

(g) *Deferral fees.*

(1) With respect to mobile home credit transactions containing precomputed finance charges, agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties, and

(i) Provide, to the extent that applicable state law does not provide for a lower charge, for a charge not exceeding one percent of each installment or part thereof for each month from the date when such installment was due to the date when it is agreed to become payable and proportionately for a part of each month, counting each day as 1/30th of a month;

(ii) Incorporate by reference the transaction to which the deferral applied;

(iii)Disclose each installment or part thereof in the amount to be deferred, the date or dates originally payable, and the date or dates agreed to become payable; and

(iv) Set forth the fact of the deferral charge, the dollar amount of the charge for each installment to be deferred, and the total dollar amount to be paid by the debtor for the privilege of deferring payment.

(2) No term of a writing executed by the debtor shall constitute authority for a creditor unilaterally to grant a deferral with respect to which a charge is to be imposed or collected.

(3) The deferral period is that period of time in which no payment is required or made by reason of the deferral.

(4) Payments received with respect to deferred installments shall be deemed to be applied first to deferred installments.

(5) A charge may not be collected for the deferral of an installment or any part thereof if, with respect to that installment, a refinancing or consolidation agreement is concluded by the parties, or a late charge has been imposed or collected, unless such late charge is refunded to the borrower or credited to the deferral charge.

(..) *Notice before repossession, foreclosure, or acceleration.*

(1) Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outsanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as de-

scribed above. The debtor is not entitled to notice of default more than twice in any one-year period.

(2) The notice in the following form shall state the nature of the default, the action the debtor must take to cure the default, the creditor's intended actions upon failure of the debtor to cure the default, and the debtor's right to redeem under state law.

TO: _____

DATE: _____, 19_____

NOTICE OF DEFAULT AND RIGHT TO CURE DEFAULT

Name, address, and telephone number of creditor _____

_____

Account number, if any _____

Brief identification of credit transaction _____

_____

You are now in default on this credit transaction. You have a right to correct this default within 30 days from the postmarked date of this notice.

If you correct the default, you may continue with the contract as though you did not default. You default consists of: _____ Describe default alleged _____

Cure of default: Within 30 days from the postmarked date of this notice, you may cure your default by (describe the acts necessary for cure, including, if applicable, the amount of payment required, including itemized delinquency or deferral charges).

_____

_____

Creditor's rights: If you do not correct your default in the time allowed, we may exercise our rights against you under the law by (describe action creditor intends to take).

If you have any questions, write (the creditor) _____ at the above address or call (creditor's designated employee) _____ at (telephone number) _____ between the hours of _____ and _____ on (state days of week) _____.

If this default was caused by your failure to make a payment or payments, and you want to pay by mail, please send a check or money order; do not send cash.